

87-621
NO. 21

FILED

OCT 15 1987

JOSEPH F. SPANIO, JR.
CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL	)	(Consolidated)
BUILDING PRODUCTS, INC.,	)	86-5822
a California corp., et al,	)	86-5834
	)	86-5974
Petitioners,)	
)	
vs.)	
)	
FRANCISCAN CERAMICS, INC.,)	
et al,)	
)	
Respondents.)	
)	

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Ninth Circuit's use, in this RICO case, of the summary judgment standard set forth in Matsushita Electric Industries Corporation v. Zenith Radio Corporation, 106 Supreme Court 1348 (1986), directly contrary to this Court's opinion in Sedima, S.P.R.C. v. Imrex Co., 473 U.S. 479, 105 S.Ct. 3275, and contrary to the Court's opinion in Matsushita because this is not an antitrust case and is a civil RICO action?

2. Did the Ninth Circuit's use of the Matsushita summary judgment standard deprive the parties of their Seventh Amendment Constitutional right to jury trial?

3. Did the Ninth Circuit's weighing of contrary inferences in this case deprive the parties of their Seventh Amendment Right to jury trial?

4. Are acts of reaffirmation of a long-term supplier relationship in order to create an expectation of continuance of that relationship, followed by abrupt termination of that relationship, sufficient to create a colorable claim of fraud able to withstand a summary judgment motion, as held by the Eighth Circuit in United Industrial Syndicate, Inc. v. Western Auto Supply Co., 686 F.2d 1312, 1318 (8th Cir. 1982)?

5. Was the denial of leave to file a second amended complaint in this case so far a departure from the accepted and usual course of judicial proceedings and a sanctioning of such a departure by the lower court as to call for the exercise of this Court's power of supervision?

PARTIES:

1. CALIFORNIA ARCHITECTURAL
BUILDING PRODUCTS, INC. (CALIFORNIA



ARCHITECTURAL) is a corporation organized and existing under the laws of the State of California. Plaintiffs FACINGS OF AMERICA, INC. (FACINGS) is a corporation organized and existing under the laws of the State of Arizona. Plaintiff RICHARD T. SOKOL is the owner and proprietor of VALLEY TILE DISTRIBUTORS (VALLEY TILE). Plaintiff SOUTHWESTERN CERAMICS & SUPPLY COMPANY (SOUTHWESTERN CERAMICS) is a corporation organized and existing under the laws of the State of California. Plaintiff PARAGON INDUSTRIES, INC., doing business as BEDROSIAN BUILDING SUPPLY (BEDROSIAN BUILDING), is a corporation organized and existing under the laws of the State of California. The following individual plaintiffs have been injured and suffered damages as a direct, proximate and foreseeable result of the actions of defendants: Charles T. Nelson



and T. James Nelligan (CALIFORNIA ARCHITECTURAL); Henry C. Croom (FACINGS); Richard Sokol (VALLEY TILE); Larry Bedrosian (BEDROSIAN BUILDING); and Vincent M. Pompo (SOUTHWESTERN).

These individuals and businesses are referred to as "Tile Dealers".

2. Defendant FRANCISCAN CERAMICS, INC. (FRANCISCAN) is a California corporation, having its principal place of business in Glendale, California, in the Central District of California. Tile Dealers allege that FRANCISCAN and its agents and employees have performed acts pursuant to a deliberate and illegal course of conduct in the Central District of California, as more fully alleged below. FRANCISCAN is a wholly owned subsidiary of Defendant JOSIAH WEDGWOOD & SONS, INC.



3. Defendant JOSIAH WEDGWOOD & SONS, INC. (JOSIAH WEDGWOOD) is a corporation organized and existing under the laws of Delaware, with its principal place of business in New Jersey, and is authorized to do and does business in the Central District of California. Tile Dealers allege that JOSIAH WEDGWOOD and its agents have performed acts in the Central District of California pursuant to a deliberate and illegal course of conduct, as more fully alleged below. JOSIAH WEDGWOOD is a wholly owned subsidiary of Defendant WEDGWOOD plc.

4. Defendant WEDGWOOD plc is a corporation organized and existing under the laws of the United Kingdom. The Tile Dealers allege that WEDGWOOD plc and its agents have performed acts in the Central District of California in a civil violation of RICO.



5. Tile Dealers allege that in doing the acts alleged, FRANCISCAN and JOSIAH WEDGWOOD were being utilized directly by and acted on the express instructions of WEDGWOOD plc, which is ultimately responsible, as a result of its own actions, and as a result of the actions of its agents FRANCISCAN and JOSIAH WEDGWOOD.



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NO. 87-_____

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OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL)	
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ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners respectfully request
that this Petition for Writ of Certiorari
be granted.



OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 4, 1987, at 818 F.2d 1466. The opinion was amended on July 31, 1987. A copy of the opinion as amended is attached as Appendix A.

The opinion of the United States District Court for the Central District of California was not officially reported. A copy of the District Court's Order and Judgment are attached as Appendix B.

JURISDICTION

1. This case arises under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. §§1961-1968. Challenge to the granting of summary judgment in this case arises under the Seventh Amendment to the United States Constitution and Federal Rule of Civil Procedure 56. Original federal jurisdiction is invoked pursuant



to 18 U.S.C. §1964 and the General Federal Question Statute, 28 U.S.C. §1331(a).

2. Summary judgment was granted in the United States District Court on March 5, 1986, and was affirmed by the Ninth Circuit Court of Appeals, opinion filed on June 14, 1987, and an amended opinion was filed on July 31, 1987.

3. The order denying a rehearing was issued on July 31, 1987.

4. The Supreme Court has jurisdiction to review the summary judgment in this case by writ of certiorari by 28 U.S.C. §1254.

CITATION OF CONSTITUTIONAL PROVISIONS AND STATUTES:

1. 18 U.S.C. §§1961, 1962 and 1964.
2. United States Constitution, Seventh Amendment.
3. Federal Rule of Civil Procedure 56.



The text of these statutes and constitutional provisions is set forth in Appendix C.

STATEMENT OF THE CASE:

This case involves the numerous acts of wire and mail fraud committed by WEDGWOOD plc, acting through FRANCISCAN CERAMICS, a tile manufacturer, in representing to the Tile Dealers in 1983 that FRANCISCAN would remain open or had a plan to remain open or was not considering closure, when, in fact, WEDGWOOD was considering FRANCISCAN's closure and was planning to close it. The misrepresentations to the Tile Dealers were made in a series of letters sent by U.S. Mail and by interstate telephone calls. WEDGWOOD's purpose was to induce the Tile Dealers to buy more tile before FRANCISCAN's closure, although such tile would and in fact did become virtually

worthless upon FRANCISCAN's closure in September, 1983. The chronology of the fraud shows consistent misrepresentations to the Tile Dealers about FRANCISCAN's intentions. FRANCISCAN was 100% owned by JOSIAH WEDGWOOD, which in turn was 100% owned by WEDGWOOD plc of England, and the fraudulent representations were made by the English and American parents of FRANCISCAN, acting through FRANCISCAN.

Starting in late 1982 and continuing to 1983, the Tile Dealers became concerned about whether WEDGWOOD intended to keep FRANCISCAN open and making tile. They sought and obtained various reassurances from WEDGWOOD that FRANCISCAN would remain open or that WEDGWOOD had no plans to close it (9th Cir. ER 1027-1106). Based on those representations, the Tile Dealers took and avoided certain actions. The representations were false, and as a



result of their reliance thereon, the Tile Dealers suffered damages compensable under RICO.

Consideration of closing FRANCISCAN began in the latter half of 1983, when William Brennan, FRANCISCAN Vice President, spoke to real estate brokers about selling a portion of the FRANCISCAN plant. In 1983, James Moffat, a WEDGWOOD plc executive (and President of FRANCISCAN after the end of July, 1983), concluded in a memorandum after a visit to FRANCISCAN that there was one year to "make or break" the FRANCISCAN operation. On March 24, 1983, WEDGWOOD's chief accountant gave Moffat a report on the costs of closing FRANCISCAN. On March 30, 1983, a Los Angeles real estate broker gave Moffat and other WEDGWOOD/FRANCISCAN executives an estimate of the value of the land where the FRANCISCAN plant was situated.



Moffat's notes on April 20, 1983, state that it was obvious that WEDGWOOD would not tolerate the losses being sustained by FRANCISCAN, and that one solution would be to shut the operation down.

On April 27, 1983, the WEDGWOOD plc directors instructed Moffat to try to establish whether there was a future for FRANCISCAN, and if not, then to "tidy up the position before closing down and disposing of the site as real estate".

On June 6, 1983, the then-president of FRANCISCAN, Ian Taylor, sent a letter by U.S. Mail to all FRANCISCAN Tile Dealers, including plaintiffs in this case, offering volume discounts on tile purchases through March 3, 1984. The very next day, June 7, 1983, Moffat wrote to Peter Williams, another WEDGWOOD plc executive, that he had "deferred consideration of real estate matters



[i.e., selling the FRANCISCAN plant] but will take up that subject later this month . . . perhaps this will be the ultimate solution."

On June 21, 1983, WEDGWOOD plc directors noted that in view of the growing losses at FRANCISCAN, "all options, including a real estate disposal, would be pursued."

On June 30, 1983, Ira Shore was appointed executive vice president of FRANCISCAN. In July, 1983, Shore told Moffat that he would tell the Tile Distributors that he had six months to turn the tile division of FRANCISCAN around. Shortly thereafter, Shore proceeded to visit the FRANCISCAN Tile Dealers, including plaintiffs. In July 1983, he told Vince Pompo that he had 18 months to turn FRANCISCAN around. In July 1983, he told Tim Nelligan that he had 12



months to turn FRANCISCAN around. In August 1983, he told Larry Bedrosian that he had until March 31, 1984, to turn FRANCISCAN around. In August, 1983, Shore told Richard Sokol that he had 18 months to turn FRANCISCAN around. In Shore's August, 1983 visit to Henry Croom of FACINGS, he gave Croom assurances of future activity, and never mentioned the possibility of closing FRANCISCAN.

On July 24 or 25 of 1983, Moffat and Shore met with FRANCISCAN Tile Dealers, including representatives of all the plaintiff businesses, and offered them assurances of FRANCISCAN's future, never mentioning consideration of closure. Richard Sokol was told by Moffat that, "We are going to build an inventory and fill our back orders - there will be no more shortages of tile". Moffat told Croom that he was optimistic about FRANCISCAN's



future, giving Croom the feeling that FRANCISCAN was here to stay. Moffat and Brennan both told Vince Pompo that FRANCISCAN was "here to stay". Moffat's encouragement at the meeting led Charles Nelson of CALIFORNIA ARCHITECTURAL to conclude that FRANCISCAN was going to continue in business. Moffat also told Larry Bedrosian that FRANCISCAN was "here to stay".

Meanwhile, steps toward closing FRANCISCAN continued. On August 3, 1983, William Brennan, FRANCISCAN's vice president, met with a real estate broker regarding sale of the FRANCISCAN property. On August 4, 1983, WEDGWOOD's group accountant updated the report of cost of closure of FRANCISCAN. On August 15, 1983, Moffat wrote to Peter Williams about the sale of FRANCISCAN's real estate. On August 19, 1983, Moffat wrote to Peter



Williams that "I do not believe that the ultimate outcome of the program of action [of keeping FRANCISCAN going] would justify the expense or the effort."

Meanwhile, FRANCISCAN continued to make representations that it would continue in business, including an August 4, 1983 letter from Ira Shore sent by U.S. Mail to all Tile Dealers, saying that certain orders would require at least 60 days lead time, indicating an intention to stay open for at least 60 days from that date, and including an August 25, 1983 letter from Shore to the Tile Dealers stating that certain tile seconds would be offered starting on September 15, 1983. A confirmation of a price quote to Richard Sokol good through February 1984, assurance given by Shore to Henry Croom on September 20, 1983, regarding the availability of tile for a specific job



until February 15, 1984, acceptance by FRANCISCAN of a purchase order from SOUTHWESTERN on September 22, 1983, and confirmation of a purchase order from BEDROSIAN BUILDING on September 13, 1983, all led the Tile Dealers to believe FRANCISCAN planned to remain open. Nevertheless, on September 23, 1983, FRANCISCAN announced that it was going to close its tile operations.

The Tile Dealers suffered the following damages resulting directly from WEDGWOOD's misrepresentations by U.S. Mail and interstate telephone calls: (1) The value of purchased inventory rendered valueless by FRANCISCAN's closing. (2) Lost sales due to the Tile Dealers' declining to sell all other lines because they believed FRANCISCAN would remain open. (3) Lost profits on jobs, when customers obtained other suppliers due to



the Tile Dealers' inability to supply FRANCISCAN tile. (4) Lost volume rebates from FRANCISCAN; and (5) Lost overhead expense due to FRANCISCAN's closure.

This RICO action was filed in the U.S. District Court, Central District of California, under 18 U.S.C. §1964 and 28 U.S.C. §1331(a).

I

THE NINTH CIRCUIT MISAPPLIED
MATSUSHITA AND SHOULD NOT HAVE
AFFIRMED THE SUMMARY JUDGMENT.

The Ninth Circuit placed an improperly high burden on the Tile Dealers, holding that they could not withstand the summary judgment motion because WEDGWOOD's fraud was economically implausible under the Matsushita antitrust summary judgment standard (9th Cir. Opinion at page 9).

This Court's decision in Matsushita Electric Industries Company, Ltd. v. Zenith



Radio Corporation, 106 Supreme Court 1348 (1986), was used as justification for the Ninth Circuit's opinion that "to avoid the stigma of implausibility, the evidentiary burden of the dealers is heavy." The Circuit Court held that the RICO scheme identified by the Tile Dealers was "economically implausible" (Opinion at 9) and that, as a result, there was no RICO violation proved.

This Court held, in Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S.Ct. 3275 at 3786-3287, that RICO is to be read broadly and is to be liberally construed to effectuate its remedial purposes. In Sedima, this Court held that the limitations of various antitrust cases and doctrines, i.e., strict requirements on "standing to sue" and "proximate cause" should not be applied to RICO cases. 105 S.Ct. at 3286-3287. In Sedima, this Court



reversed the Second Circuit's imposition of such barriers to suit, holding that it was the intent of Congress to give RICO plaintiffs broad scope to bring RICO actions. Sedima, 105 S.Ct. at 1387.

Just as in Sedima, so in this case, the Ninth Circuit Court of Appeals created exactly the problems that Congress and this Court (in Sedima) sought to avoid, i.e., using a restrictive antitrust standard to dispose of a RICO action. This Court should reverse. The Ninth Circuit's opinion seems to hold that WEDGWOOD's actions cannot have been fraud because WEDGWOOD did not make any (or perhaps enough) profit from it. But fraud damages are measured by injury to the victim, not profit or loss of the defrauder.

Matsushita evolved as a reaction to the summary judgment standard set for

antitrust litigation in Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486 (1962). Poller established that courts should be reluctant to grant summary judgment where motive and intent are key issues:

"We believe that summary procedures should be sued sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof of which is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." 368 U.S. at 473, 82 Supreme Court at 491.

The general expectation of lack of objective evidence of conspiracy which made the Court reluctant to grant summary judgment in Sherman Act Section One cases led the Court to find the Matsushita

standard as an alternative means of disposing of Sherman Act Section One cases by summary judgment.

Matsushita is not needed in RICO cases to foster the usefulness of summary judgment. Whereas, in Sherman Act cases, acts in furtherance of an alleged antitrust conspiracy (e.g., raising prices) can also serve legitimate business purposes, in RICO cases, making false representations can have no legitimate business purpose. The false representations by FRANCISCAN to its Tile Dealers show objective evidence of a scheme to defraud. Because this objective evidence of the scheme exists, no higher than normal threshold for withstanding summary judgment is necessary in RICO frauds. Once it is established that the alleged fraudulent representations were false, the original thrust of Poller

should be followed - issues of intent and motive should be left to the trier of fact.

Specifically in this case, it is objectively true that FRANCISCAN closed on September 23, 1983. It is objectively true that WEDGWOOD officials stated that it would not close, not only at the July 9, 1983 meeting of Tile Dealers and at individual meetings of Tile Dealers with Ira Shore, but also in correspondence sent by U.S. Mail and by interstate telephone calls. The trier of fact, not the Ninth Circuit Court of Appeals, should now decide whether WEDGWOOD intended these representations as inducements to FRANCISCAN's dealers to buy additional inventory which would soon be rendered worthless by the closing of the FRANCISCAN factory.

The folly of applying Matsushita



outside the antitrust context is demonstrated in the instant case. FRANCISCAN's RICO scheme here clearly "made economic sense" because increased unloading of tile (onto dealers before closure) reduced FRANCISCAN's losses. The alleged conspiracy in Matsushita involved predatory pricing, which by definition is pricing below cost, causing a loss of revenues. The Court refused to infer a predatory pricing conspiracy from low prices alone, noting that scholarly authorities have found the cost to the conspirators of such a scheme is substantial and the likelihood of success small.

The pattern of fraud was intended to decrease FRANCISCAN's anticipated losses due to closure. WEDGWOOD acted to increase FRANCISCAN's profits by misleading the Tile Dealers about plans



for closing. If WEDGWOOD or FRANCISCAN made any investments in the tile equipment or inventory before closing may be considered in deciding whether FRANCISCAN had the requisite intent to defraud. Such investments, if any there were, were not part of the scheme itself, so that they could not render that scheme "economically senseless". The Ninth Circuit itself admitted that the alleged scheme to defraud was credible, in denying Fed.R.Civ.Pro. 11 sanctions to FRANCISCAN:

"Franciscan's sudden closing was circumstantial evidence, however weak, of a possible earlier undisclosed plan to close. The dealers say they would have bought less inventory from Franciscan if they had known of its impending closure, so dissimulation might have been in Franciscan's interest." Decision, at page 15. (Emphasis added).

Because there can be no legitimate business reason for FRANCISCAN's blatantly false representations sent by U.S. Mail to

all the Dealers (such as those of Ira Shore to the Tile Dealers), such representations necessarily raise an inference of fraud. By misapplying the Matsushita standard, the Ninth Circuit found itself weighing the inference of fraud against inferences raised by the evidence which may have indicated that FRANCISCAN was operating on a going concern basis. This weighing takes the determination of fact away from the jury, which is impermissible under the Seventh Amendment of the United States Constitution and Fed.R.Civ.Pro. 56.

The Ninth Circuit itself has found such weighing improper, especially when the issues in the balance are questions of intent and notice:

"In determining whether an inference may be reasonable, the District Court should not weigh competing inferences against each other [reference omitted]. When there is 'substantial factual evidence'

supporting both an inference of conspiracy and an inference of unlawful conduct 'and the crucial question [involved] motive' summary judgment is inappropriate."

Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985); Quoting First National Bank of Arizona v. Cities Service, 391 U.S., 253, 287, 88 S.Ct. 1575, 1590 (1968).

The Ninth Circuit's summary judgment in this action also violates its own holding that "when intent is at issue, the Court should be cautious in granting summary judgment." Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1220 (9th Cir. 1980). In such a case, the moving party bears a heavier burden of showing that there exists no genuine issue of material fact. Admiralty Fund v. Jones, 677 F.2d 1289, 1295 (9th Cir. 1982).

In order to withstand this motion for summary judgment, "the plaintiff . . . need only present evidence from which a jury might return a verdict in his favor".

Anderson v. Liberty Lobby, 106 S.Ct. 2505, 2514 (1986). The Eighth Circuit has directly concluded that acts of reaffirmation of a long-term supplier relationship in order to create an expectation of continuance of that relationship is actionable fraud, and proof of such reaffirmation followed by termination constitutes a colorable claim able to withstand a summary judgment motion. United Industrial Syndicate, Inc. v. Western Auto Supply Co., 686 F.2d 1312, 1318 (8th Cir. 1982).

II

BY ITS OWN LANGUAGE, THE NINTH CIRCUIT ESTABLISHED THAT THE SECOND AMENDED COMPLAINT IS NOT FUTILE.

The second amended complaint added the following language describing the



fraudulent scheme of WEDGWOOD (Second Amended Complaint, p. 7, lns. 7-11, 9th Cir. ER at 1232:

"Third, Franciscan represented to the tile dealers that it had a plan to stay in business producing tile through at least March of 1984 when in fact it had no such plan it was actively considering and later adopted a plan of action to the contrary, involving immediate closure of the plant."

The Ninth Circuit opinion states that "[t]he proposed second amended complaint adds, as an alternative theory of recovery, allegations that FRANCISCAN actively considered closing while it represented to the Tile Dealers that it intended to remain open." This is not the substance of the second amended complaint. The complaint does not merely say that FRANCISCAN represented itself as having a present intent to remain open, but that FRANCISCAN claimed to have a plan to remain open - i.e., that closure was not



under consideration at all. The Ninth Circuit itself noted that "Franciscan management investigated closing as a contingency plan." See Opinion at page 9. This is enough under the second amended complaint to establish that FRANCISCAN committed fraud.

The Tile Dealers do not allege that FRANCISCAN had a duty to disclose its business plans to its Dealers, but that FRANCISCAN's misleading partial disclosures were fraudulent. FRANCISCAN's representations would lead a reasonable person to believe no closure was being considered, while the actual consideration of closure remained undisclosed.

While nondisclosure may be inactionable under some circumstances, United States v. Dowling, 739 F.2d 1445, 1449 (9th Cir. 1984), rev'd. on other grounds, 473 U.S. 207 (1985), partial



disclosure as alleged in the second amended complaint is mail and wire fraud, Lustiger v. United States, 386 F.2d 132, 138 (9th Cir. 1967) cert. den., 390 U.S. 951, 88 S.Ct. 1042, 19 L.Ed.2d 1142 (1968) and Irwin v. United States, 338 F.2d 770, 775-776 (9th Cir. 1964), cert. den. 381 U.S. 911. The Tile Dealers should have been permitted to proceed to trial at least on the issues raised in the second amended complaint.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

1. In this case, the Ninth Circuit has incorrectly applied the standard for summary judgment used by the Supreme Court in Matsushita.

2. The Ninth Circuit's ruling in this case on the standard for summary judgment conflicts with its own prior rulings.



3. The Ninth Circuit's ruling in this case on what constitutes a colorable claim of fraud able to withstand a summary judgment motion conflicts with the Eighth Circuit's holding in United Industrial Syndicate, Inc. v. Western Auto Supply Co., 686 F.2d 1312 (8th Cir. 1982).

4. The Ninth Circuit's weighing of inferences in deciding on the summary judgment motion in this case deprives the plaintiff of the right to jury determination of such facts at trial, as guaranteed by the Seventh Amendment to the United States Constitution.

5. The Ninth Circuit's denial of leave to file a second amended complaint in this case is an abuse of discretion under Fed.R.Civ.Pro. 15(a).

CONCLUSION - RELIEF REQUESTED

This Court should reverse the Ninth Circuit's ruling in this case and order



the U.S. District Court to file the Tile
Dealers' second amended complaint and deny
WEDGWOOD's motion for summary judgment.

Dated: September 25, 1987

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Benjamin Williams", is written over a horizontal line.

BENJAMIN GEORGE WILLIAMS
Attorney for Petitioners
CALIFORNIA ARCHITECTURAL
BUILDING PRODUCTS, INC., et al.

APPENDIX A



APPENDIX A

IN THE UNITED STATES DISTRICT COURT
- FOR THE CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA	)	NO. CV 84 7125 FW
ARCHITECTURAL)	
BUILDING PRODUCTS,)	
INC.,)	
)	
Plaintiffs,)	
)	
vs.	)	ORDER
)	
FRANCISCAN CERAMICS,)	
INC., etc., et al,)	
)	
Defendants.)	
)	

The motions of defendants Franciscan Ceramics, Josiah Wedgwood & Sons and Wedgwood plc (1) for Summary Judgment on the First Amended Complaint and (2) for sanctions against plaintiffs and their counsel under Rule 11 of the Federal Rules of Civil Procedure, and plaintiffs' Motion for Leave to Amend the First Amended Complaint, came on regularly for hearing



on March 4, 1986, at 1:30 p.m. in Courtroom 7 of the above entitled Court, the Honorable Francis C. Whelan, presiding.

John W. Cotton of Rogers & Wells and C. Robert Ferguson appeared on behalf of defendants. Benjamin George Williams appeared on behalf of plaintiffs.

After consideration of the papers submitted and argument of counsel, and good cause shown therefor, the Court:

(1) GRANTS defendants' Motion for Summary Judgment on the RICO claim, 18 U.S.C. 1961 et seq., on the ground that there was no pattern of racketeering in the closure of the Franciscan factory;

(2) GRANTS defendants' Motion for Sanctions under Rule 11 of the Federal Rules of Civil Procedure in the sum of \$350.00; and



(3) Denies plaintiffs' Motion for
Leave to Amend the First Amended Complaint
without prejudice to permit plaintiffs' to
allege any assertable claims not based
upon RICO.

DATED: March 5, 1986 /s/ Francis C. Whelan
UNITED STATES

DISTRICT

JUDGE

SUBMITTED BY:

DATED: March 4, 1986 ROGERS & WELLS
GERALD E. BOLTZ
JOHN W. COTTON
CHRISTINE A. PAGE

C. ROBERT FERGUSON

BY: /s/ John W. Cotton
John W. Cotton
Attorneys for
Defendants
Franciscan
Ceramics
Inc., Josiah
Wedgwood & Sons,
Wedgwood plc



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA)	NO. CV 84 7125 FW
ARCHITECTURAL)	
BUILDING)	
PRODUCTS, INC.,)	
)	
Plaintiffs,)	
)	
vs.	)	JUDGMENT
)	
FRANCISCAN)	
CERAMICS, INC.,)	
etc., et al,)	
)	

— This action came on for hearing before the Court, Honorable Francis C. Whelan, presiding, and the issues having been duly heard, the Court on March 5, 1986 issued an Order (1) granting defendants' Motion for Summary Judgment on the First Amended Complaint, (2) granting defendants' Motion for Sanctions under Rule 11 of the Federal Rules of Civil Procedure in the sum of \$350.00, and (3) denying plaintiffs' Motion for Leave to Amend the First Amended Complaint without



prejudice to permit plaintiffs to allege any assertable claims not based upon RICO. On April 2, 1986 plaintiffs filed a Notice Of Election Not To Amend First Amended Complaint.

Therefore, IT IS ORDERED AND ADJUDGED that plaintiffs take nothing, that the action be dismissed on the merits, and that defendants recover of plaintiffs their costs of action and of plaintiffs and their counsel \$350.00 in sanctions.

Dated at Los Angeles, California, this _____ day of April, 1986.

CLERK OF THE DISTRICT COURT

APPENDIX B



APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA	)	Nos. 86-5822,
ARCHITECTURAL	)	86-5834, 86-5974
BUILDING)	
PRODUCTS, INC.,	)	D.C. NO.
et al,	)	CV-84-7125-FW
)	
Plaintiff/)	
Appellants/)	
Cross-Appellees,)	
)	
vs.	)	ORDER AND
	)	AMENDED OPINION
)	
FRANCISCAN)	
CERAMICS, INC.,)	
et al,)	
)	
Defendants/)	
Appellees/)	
Cross-)	
Appellants.)	
)	

Argued February 3, 1987-Pasadena, CA
Submitted March 19, 1987

Filed June 4, 1987
Amended July 31, 1987

Before: Joseph T. Sneed, Jerome Farris
and John T. Noonan, Jr., Circuit Judges

Opinion by Judge Sneed

Appeal from United States District Court
for the Central District of California
Francis C. Whelan, District Judge, Presiding

SUMMARY

RICO

Appeal from grant of summary judgment and imposition of sanctions. Affirmed in part and reversed in part.

This action arises from appellants', dealers in ceramic tile, claim that appellee, a manufacturer of ceramic tile, fraudulently assured them that it would continue in business and supply them with tile at least until the end of March 1984 in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). The district court granted the motion for summary judgment, denied the dealers motion to amend the first amended complaint without prejudice as to future claims not based on RICO, and granted sanctions against the dealers-attorneys.

[1] RICO defines pattern of



racketeering activity without mentioning continuity. Because the dealers allege that the manufacturer made multiple fraudulent sales to them as multiple victims, they have alleged acts which constitute a pattern. [2] The manufacturer led the dealers to believe that it intended to stay in business, not to defraud them, but because that was its true intent. [3] The dealers' depositions reveal that they have no factual basis for alleging that the manufacturer had a preconceived plan to close. [4] Furthermore, this court is convinced that no reasonable trier of fact could infer a scheme to defraud from the manufacturer's routine business correspondence. [5] The dealers suggest that the manufacturer ought to have told them it was investigating a contingent plan to close down. [6] However, absent



an independent duty, failure to disclose cannot be the basis of a fraudulent scheme. [7] Since the dealers cannot show that there is a genuine issue of fact regarding the manufacturer's alleged scheme to defraud, denial of leave to amend was well within the district court's discretion. [8] Although Williams ultimately failed to adduce substantial support for the complaint, the suit was not so baseless that sanctions ought to be imposed.

COUNSEL

Benjamin George Williams, Los Angeles, California, for the plaintiffs/appellants/cross-appellees.

John W. Cotton, Los Angeles, California, for the defendants/appellees/cross-appellees.

ORDER

The slip opinion in these cases,



filed June 4, 1987, is hereby amended as follows:

The following sentence is inserted at page 7 of the slip opinion immediately following the sentence, "By contrast, here the dealers allege that Franciscan made multiple fraudulent sales to them as multiple victims.":

Furthermore, Franciscan's alleged misrepresentations constituted continuing activity from May 1983 to September 1983 - a period of five months.

With the opinion so amended, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc.



Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

OPINION

SNEED, Circuit Judge:

Dealers in ceramic tile brought this civil action against a manufacturer under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968. The district court granted summary judgment for the manufacturer on the ground that there was no pattern of racketeering. The court also denied the dealers' motion for leave to amend their First Amended Complaint with prejudice as to any claims based on RICO. Finally, the court granted \$350 in sanctions against the dealers' attorney under Fed. R. Civ. P. 11. We affirm the summary judgment and the denial of leave to amend, but reverse



the award of Rule 11 sanctions.

I.

FACTS AND PROCEEDINGS BELOW

Dealers, plaintiffs below and appellants and cross-appellees, are five businesses and six individuals that sold ceramic tile. The appellees and cross-appellants here and defendants below, are a manufacturer of ceramic tile, Franciscan Ceramics, Inc. (Franciscan); its American parent, Josiah Wedgwood & Sons, Inc.; and that company's English parent, Wedgwood plc (Wedgwood).

The dealers' First Amended Complaint alleges that Franciscan fraudulently assured them that it would continue in business and would supply them with tile until at least the end of March 1984. It further alleges that Franciscan decided prior to May 3, 1983 that it would close in September or October 1983. In fact,

Wedgwood's board of directors voted on September 22, 1983 to close Franciscan by the end of October. The dealers charge that Franciscan concealed its plan from them so that they would continue to buy tile. This enabled Franciscan to reduce inventory losses that it otherwise would have suffered had it given notice of its intentions prior to May 3, 1983.

Franciscan made the alleged misrepresentations through the United States mail or through interstate telephone calls. Therefore, the misrepresentations might be the basis of a RICO claim. 189 U.S.C. §1961(1)(B). The dealers claim as damages the costs they incurred in stocking and promoting Franciscan tile on the assumption that Franciscan would continue in business, as well as the profits they lost on both the purchased and delivered and the tile



ordered but not delivered by Franciscan.

Under RICO, damages are trebled. 18

U.S.C. §1964(c).

Shortly before the discovery cutoff date, the dealers moved for permission to file a Second Amended Complaint. The proposed complaint reflected a more narrow focus than did the first. It alleged as an alternative ground for recovery that Franciscan represented that it had a plan to continue in business through March 1984, when it in fact had no such plan. Franciscan subsequently moved for summary judgment on the First Amended Complaint. Franciscan also moved for sanctions under Fed. R. Civ. P. 11. Franciscan alleged that the dealers' attorney had signed the First Amended Complaint and had persisted in prosecuting the lawsuit when a reasonable inquiry would have disclosed that the First Amended Complaint was not



well grounded in fact.

At a hearing held March 4, 1986, the district court granted the motion for summary judgment, denied the motion to amend the First Amended Complaint without prejudice as to future claims not based on RICO, and granted \$350 in sanctions under Fed. R. Civ. P. 11. On April 7, 1986, Franciscan filed a notice of cross-appeal from the award of sanctions, insisting that the sanctions were inadequate. On April 30, 1986, the district court entered a judgment conforming to its earlier order. On May 22, 1986, the dealers filed a notice of appeal from this judgment. All notices were timely under Fed. R. App. P. 4(a). This court has jurisdiction under 28 U.S.C. §1291. The two appeals and the cross-appeal are consolidated in this action.

II.

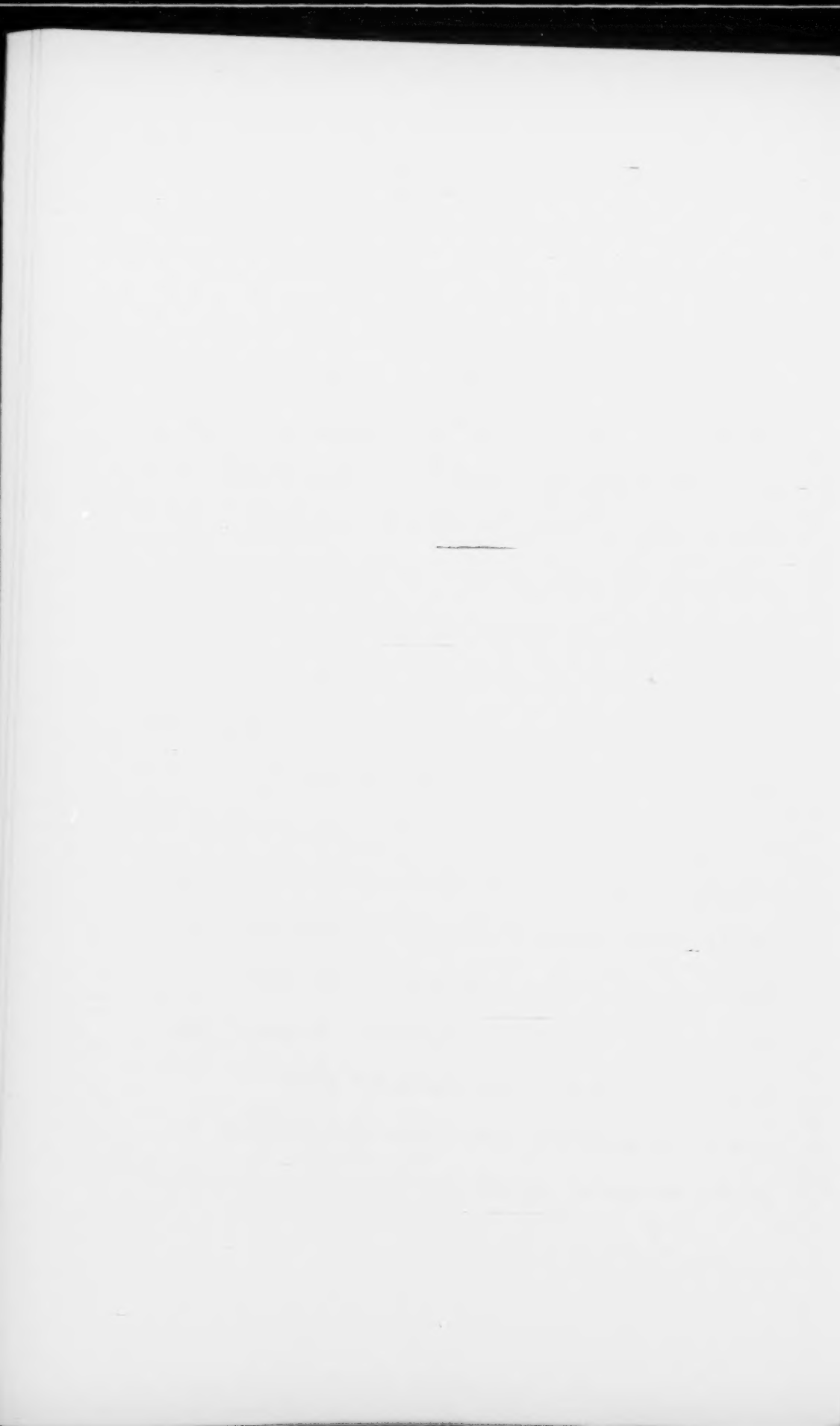


PATTERN OF RACKETEERING

A. Standard of Review for Summary Judgment.

As we regularly recite, this court reviews de novo a grant of summary judgment. Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 764 (9th Cir. 1986). Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In three recent cases, the Supreme Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First, the Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential



to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, the summary judgment is appropriate. See Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552-53 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986) (emphasis added). Finally, if the factual content makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,



106 S. Ct. 1348, 1356 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment.

B. Summary Judgment was Appropriate.

The district court based its grant of summary judgment on the ground that the dealers had not shown a "pattern" of racketeering activity under RICO.

Although we cannot agree with this conclusion, we do hold that the dealers failed to show that there is a genuine issue of fact regarding the facts of fraud on which the RICO charge is based.

Therefore summary judgment was appropriate and we affirm the district court.

1. RICO's "Pattern" Requirement.

Turning to the "pattern" requirement, our starting point is to recognize that a "pattern of racketeering activity" consists of at least two acts of racketeering

activity. 18 U.S.C. §1961(5). The theory of the dealers, set forth in their First Amended Complaint, is that Franciscan committed at least twenty-four separate acts of mail and wire fraud, which are acts of racketeering activity under 18 U.S.C. §1961(1)(B), and thus constitute a "pattern".

Franciscan replies by expanding the focus of inquiry. In its view the alleged acts of mail and wire fraud do not constitute a "pattern" of racketeering activity because they pertain to a single alleged criminal episode, the closing of Franciscan. A "pattern," Franciscan points out, requires "continuity plus relationship." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, _____, 105 S. Ct. 3275, 3285 n. 14 (1985) (quoting S. Rep. No. 617, 91st Cong. 1st Sess. 158 (1969) (emphasis added)). Continuity is lacking,



Franciscan insists, when acts pertain to a single criminal episode. Under these circumstances there is no ongoing illegal activity.

[1] This approach is not without its appeal. However, the plain words of RICO preclude it. RICO defines "pattern of racketeering activity" without mentioning continuity. See 18 U.S.C. §1961(5). There is no suggestion that the underlying illegal acts must be part of different criminal episodes. The dictum in Sedima is suggestive, but without additional explication by the Supreme Court we decline to follow its lead. Nor does our recent decision in Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986), require us to do so. There we held that plaintiffs failed to state a RICO claim by alleging acts of mail and wire fraud relating to the



diversion of a single shipment of products. Id. at 1399. That was a single fraud perpetrated on a single victim. By contrast, here the dealers allege that Franciscan made multiple fraudulent sales to them as multiple victims. Furthermore, Franciscan's alleged misrepresentations constituted continuing activity from May 1983 to September 1983 -- a period of five months. Therefore the dealers have alleged two or more acts of racketeering activity, and this, we hold, constitutes a "pattern." (Footnote 1)

2. The alleged intent to defraud.

The elements of the alleged mail and wire fraud consist of, first, a scheme or artifice devised with specific intent to defraud and, second, use of the United States mails or interstate telephone wires in furtherance thereof. Schreiber, 806 F.2d at 1399-400; see United States v.

Bohonus, 628 F.2d 1167, 1171 & n.7 (9th Cir.), cert. denied, 447 U.S. 928 (1980). In the context of Franciscan's motion for summary judgment, the issue is whether there exists a genuine issue of fact with respect to whether Franciscan had an intent to defraud. The dealers allege that Franciscan has actually admitted this intent. We disagree.

[2] The record, on the basis of which Franciscan's motion must be judged, reveals that Franciscan never misrepresented its intentions to the dealers. Until the day it closed, Franciscan operated as a going concern. Although Franciscan's management investigated closing as a contingency plan, it did not conduct the business as though closing were likely. Franciscan led the dealers to believe that it intended to stay in business, not to



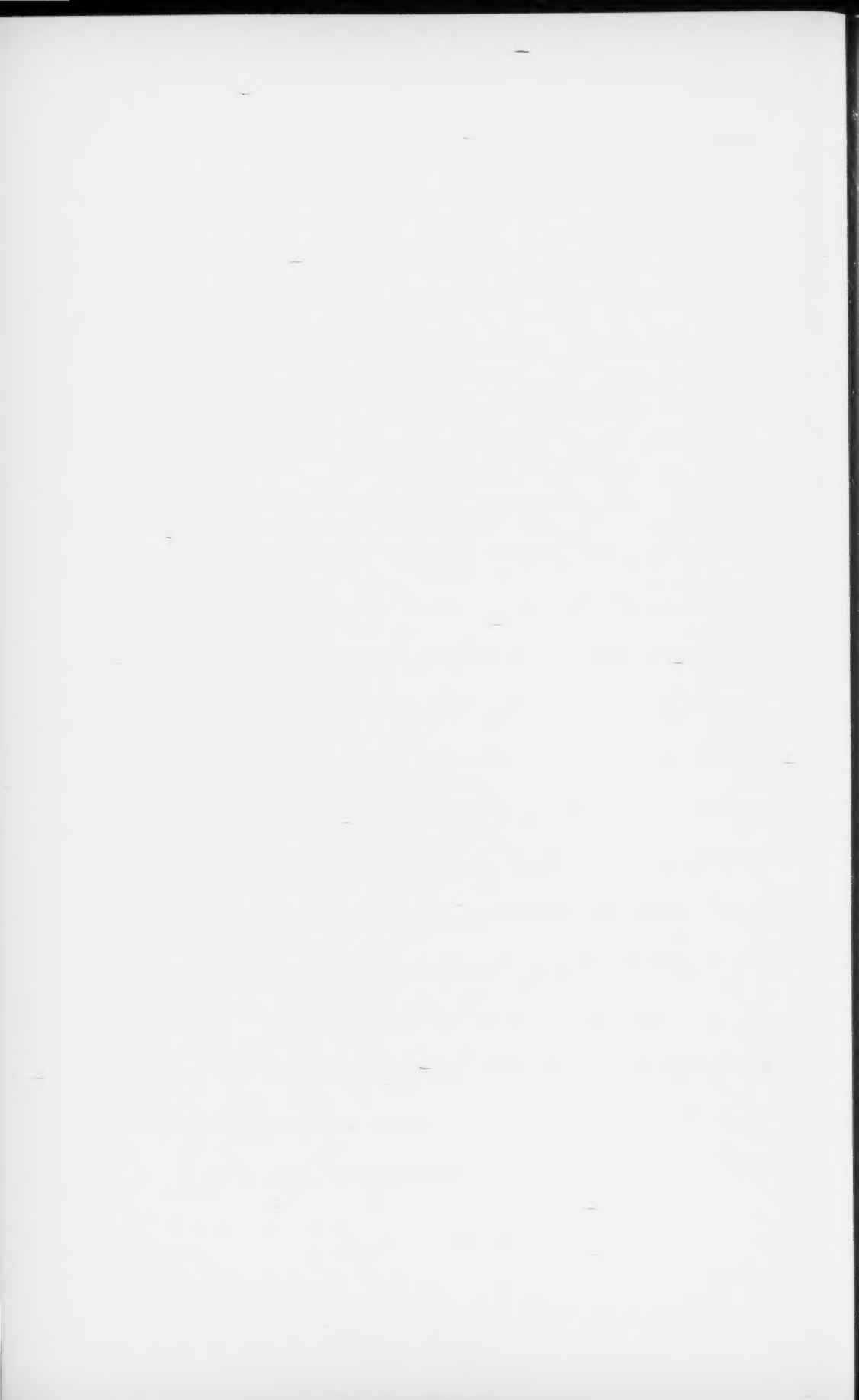
defraud them, but because that was its true intent. Therefore there was no fraud. (Footnote 2) Franciscan's massive, unforeseen operating losses, which upset its plans and forced it to close, cannot retroactively make fraudulent an intent that was honest during the relevant period.

As Wedgwood and its subsidiaries closed their books in March 1983, management realized that Franciscan would show losses substantially exceeding projections. To correct the problem, Wedgwood appointed James Moffat to be the new chief executive officer of Franciscan. Moffat was "to try to establish whether there was a future for the operation, and if there was not, then to tidy up the position before closing down and disposing of the site as real estate, although it was felt that this ultimate step would be second best." Extracts of Minutes of a



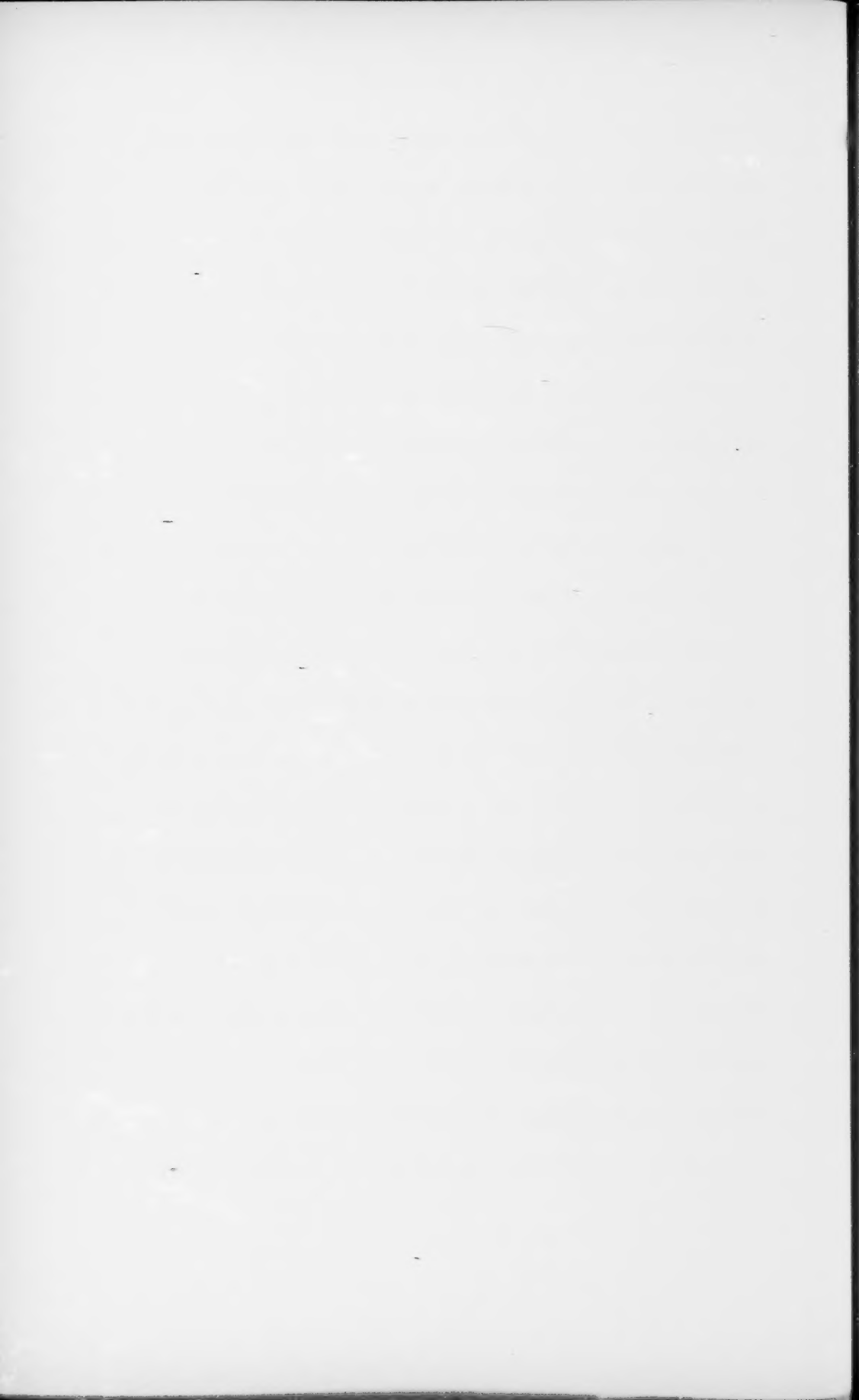
Meeting of Directors April 27, 1983, Except of Record (E.R.) at 294. All of the material collected by the dealers is consistent with the fact that, between May and September 1983, Moffat tried to restore Franciscan's profitability while investigating opportunities for disposing of the real estate, should it prove necessary to close down. Although Moffat personally was convinced by August 19 that Wedgwood ought to close Franciscan, the board did not make its decision until after Wedgwood's senior operating executive made his annual visit to Franciscan in September 1983. Franciscan continued production through October to fill outstanding orders.

From May to September 1983, Franciscan invested substantially in its tile business. Franciscan continued in full production and increased its own



inventory. It developed new designs and colors of tile, even some that would not be available until October 1983 or later. It hired a technical consulting firm to visit its factory and recommend improvements. And it explored possibilities for future joint marketing arrangements with other tile manufacturers.

Had Franciscan planned to close, it is unlikely that it would have undertaken these expensive projects. It is also unlikely that Franciscan would go to such lengths merely to encourage the dealers to buy more tile. No economic incentive to act in that manner exists. Therefore to avoid the stigma of implausibility, the evidentiary burden of the dealers is heavy. "[I]f the claim is one that simply makes no economic sense -- [the parties opposing summary judgment] must come forward with more persuasive evidence to



support their claim than would otherwise be necessary." Matsushita, 106 S. Ct. at 1356. We conclude that the dealers have failed to carry this burden.

[3] Our conclusion is not shaken by those portions of the record on which the dealers particularly rely. First, there is no direct evidence -- no "smoking gun." The dealers' depositions reveal that they have no factual basis, apart from discussions with their counsel, for alleging that Franciscan had a preconceived plan to close, far less a plan to dump inventory. E.R. at 506-07 (Larry Ed Bedrosian), 537 (Henry C. Croom), 577-78 (Charles T. Nelson), 584-85 (Vincent Pompo), 590-91 (Richard Thomas Sokol), 601-02 (H.M.M. "Dick" van Gilse). Second, the indirect evidence is weak. The dealers claim that Franciscan made representations that were inconsistent



with its decision to close in September 1983. These representations had as their source either routine business correspondence, individual assurances, or failures to disclose. We now examine each of these sources.

a. Routine business correspondence

The dealers purport to find a promise by Franciscan to stay in business in a letter describing its volume discount pricing plan, E.R. at 12-13. (First Amended Complaint ¶22), in a letter announcing a reduced price for a line of tile, E.R. at 13 (First Amended Complaint ¶24), and in its agreements with dealers to supply in the future certain quantities of tile at specified prices, E.R. at 13-20 (First Amended Complaint ¶¶25-34). The dealers confuse these contingent statements of intent with binding commitments. For example, Franciscan said



its volume discount pricing plan would expire March 31, 1984, the date the term of its fiscal year and business plan ends. This is merely a representation that volume discounts probably would not change before then. It is not a promise that Franciscan would remain in business at all costs until then. Nor did Franciscan's promise that, after August 1, it would fill orders for a certain line of tile more quickly and at a lower price constitute a promise to stay in business indefinitely. A promise to sell at a specific price in the future is not a promise to remain in business long enough to sell at that price. To assure that, a prudent businessman would enter into a contract providing for future delivery of specific goods at the agreed price.

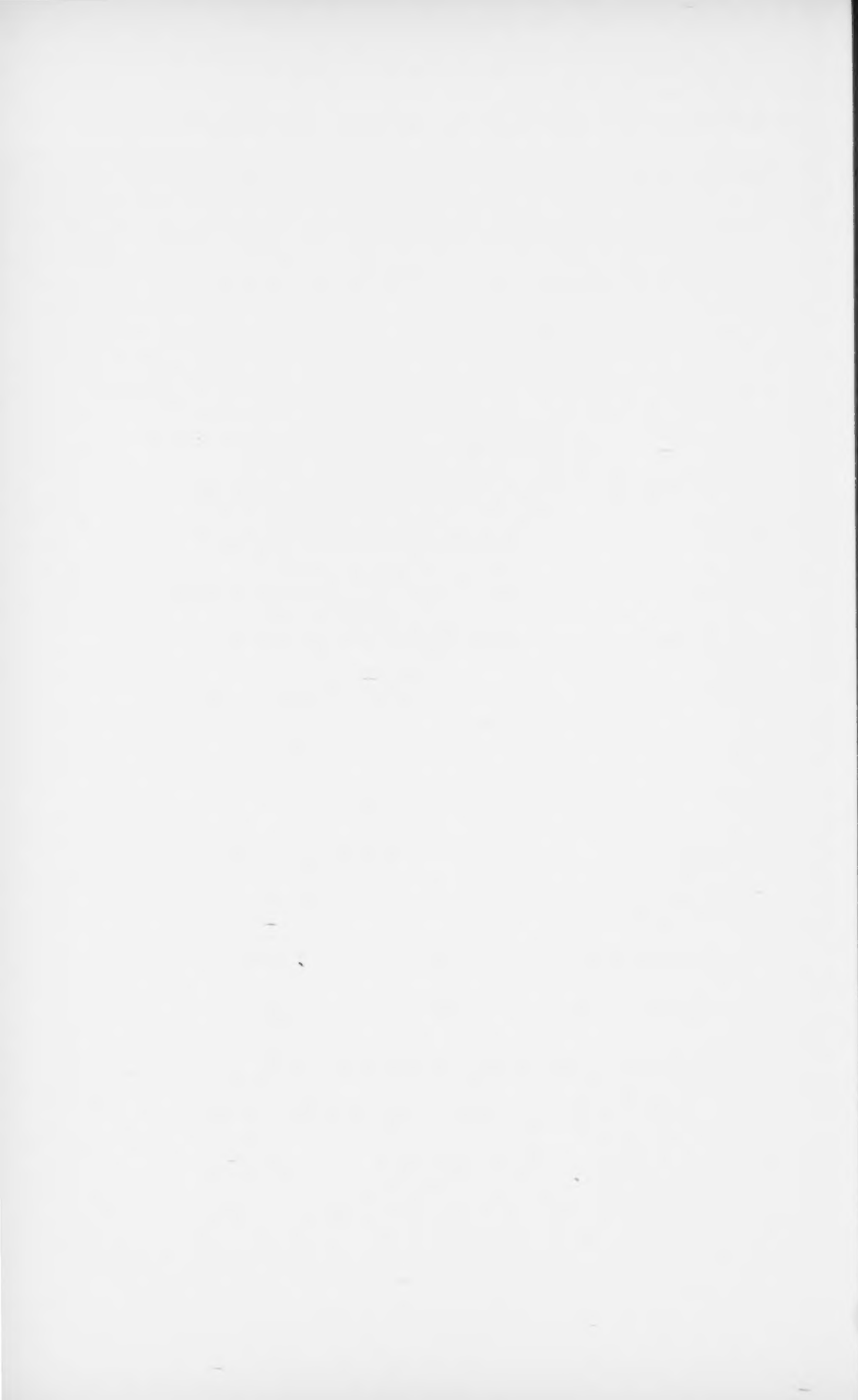
[4] Franciscan's routine business correspondence reveals that it made a



sincere and energetic effort to improve sales and become profitable. It never explicitly promised to stay in business until a certain date. We are convinced that no reasonable trier of fact could infer a scheme to defraud from this evidence.

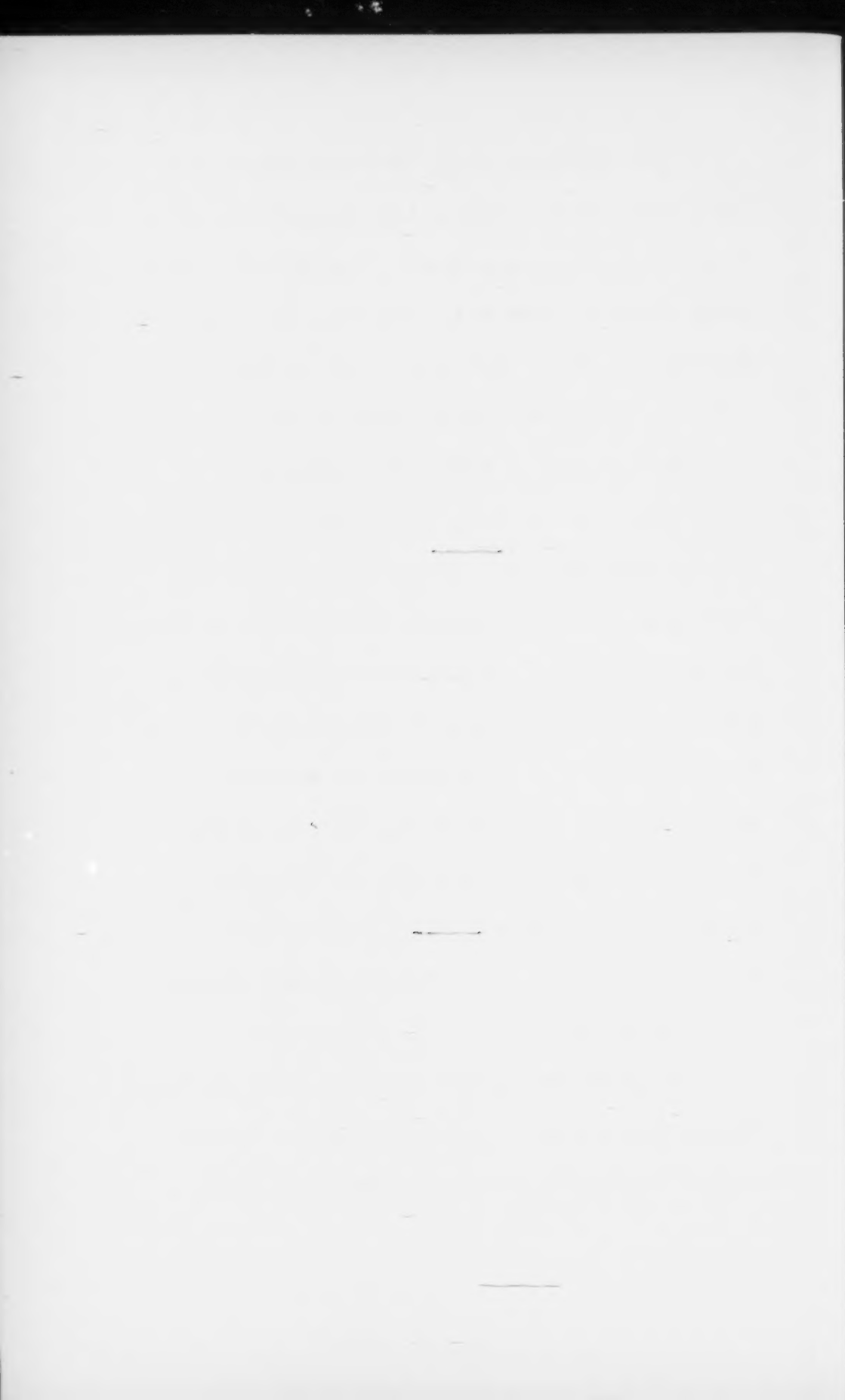
b. Individual assurances

The dealers, in support of their motion opposing summary judgment, point to their declarations describing how officers of Franciscan reassured them when they doubted Franciscan's viability. E.R. at 1027-106. They describe how, early in 1983, officers of Franciscan said that Franciscan was "here to stay" or made similar general assurances. These representations of their intentions were not false. Franciscan had not yet seriously considered closing, and it in fact remained in business six to nine months longer.



The dealers also declare that, in July and August 1983, the executive Vice President of Franciscan, Ira Shore, told them that he had six, twelve, or eighteen months "to turn the business around." E.R. at 1029 (Richard Sokol), 1043 (Vincent Pompo), 1057 (J. Timothy Nelligan), 1078 (Bob Steffler), 1099 (Larry Bedrosian). Shore's deposition confirms that, in early August, he visited several dealers to promote sales and mentioned the six-month time frame. Shore based his statement on a July conversation with Moffat. He told Moffat that he needed six months to improve significantly sales to distributors. Moffat wanted faster results, but accepted Shore's timetable. E.R. at 961-76.

No promise by Moffat was made to keep Franciscan open six months while Shore tried to improve sales. Nor did Shore



understand Moffat to have made such a promise. By mentioning the six-month period to the dealers, Shore sought to emphasize the urgency of Franciscan's appeal to them to buy more. They did not respond. When Shore first made his six-month projection, sales had fallen 36% short of the business plan for June. E.R. at 342. Sales fell 43% short of plan in July, and 37% short of plan in August. E.R. at 346, 463. Franciscan could see the handwriting on the wall. It did not have to wait another four months to recognize the inevitable. Sales were not to improve.

No reasonable trier of fact could infer fraud from Shore's statements. In context, Shore merely fixed a target date before which, to avoid serious trouble, sales would have to improve. Only an incorrigible optimist could understand



that as either a promise to remain open without regard to sales or as a representation of sound economic health.

c. Nondisclosure

[5] The dealers suggest that Franciscan ought to have told them that it was investigating a contingent plan to close down. E.g., E.R. at 1883-86. We disagree.

[6] Absent an independent duty, such as a fiduciary duty or an explicit statutory duty, failure to disclose cannot be the basis of a fraudulent scheme. United States v. Dowling, 739 F.2d 1445, 1449 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 207 (1985). No such duty existed and, hence, no fraud.

III.

DEALERS' MOTION FOR LEAVE TO AMEND

A. Standard of Review

This court reviews for an abuse of



discretion the district court's denial of leave to amend after a responsive pleading has been filed. Gabrielson, 785 F.2d at 765. Unless this court has a definite and firm conviction that the district court committed a clear error of judgment, it will not disturb the district court's decision. Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981). When exercising its discretion, however, the district court must heed Fed. R. Civ. P. 15(a), which says that leave to amend "shall be freely given when justice so requires." Folman v. Davis, 371 U.S. 178, 182 (1962). Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility. Id.

B. Analysis

[7] It is on "futility" that we rest our decision. The proposed Second Amended Complaint adds, as an alternative



theory of recovery, allegations that Franciscan actively considered closing while it represented to the dealers that it intended to remain open. Like the First Amended Complaint, the proposed complaint requires the dealers to prove that Franciscan represented that it would remain open. We can add nothing to our explanation why no reasonable trier of fact could conclude that Franciscan's statements had this force. It follows that the dealers cannot show that there is a genuine issue of fact regarding Franciscan's alleged scheme to defraud. Denial of leave to amend was well within the district court's discretion.

Gabrielson, 785 F.2d at 766; see Klamath-Lake Pharmaceutical Ass'n. v. Klamath Medical Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir.), cert. denied, 464 U.S. 822 (1983).



IV.

SANCTIONS UNDER FED. R. CIV. P. 11

A. Standard of Review

This court reviews de novo the district court's legal conclusion that the conduct of the dealers' attorney, Benjamin Williams, violated Fed. R. Civ. P. 11. Lacina v. G-K Trucking, 802 F.2d 1190, 1193 (9th Cir. 1986).

B. Analysis

[8] We reverse award of sanctions against Williams. Franciscan charges that Williams signed the First Amended Complaint and persisted in prosecuting the lawsuit when a reasonable inquiry would have disclosed that the First Amended Complaint was not well grounded in fact. Although Williams ultimately failed to adduce substantial support for the complaint, the suit was not so baseless that sanctions ought to be imposed.



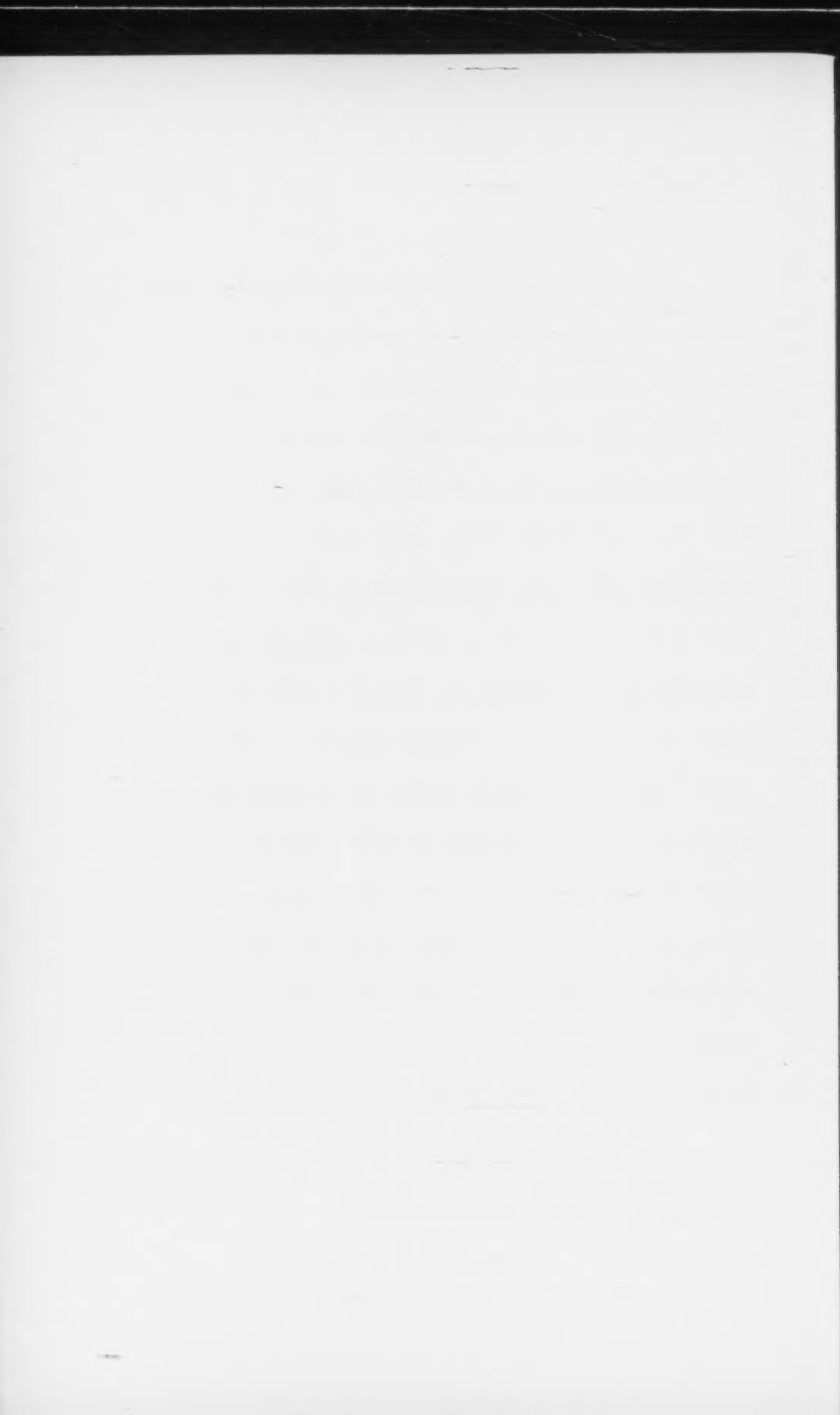
Franciscan's sudden closing was circumstantial evidence, however weak, of a possible earlier undisclosed plan to close. The dealers say they would have bought less in inventory from Franciscan if they had known of its impending closure, so dissimulation might have been in Franciscan's interest. While these facts do not suffice to create a genuine issue for trial, we cannot say that the complaint is so lacking in plausibility as to make Williams' decision to sign and certify it subject to sanctions under Fed. R. Civ. P. 11.

AFFIRMED in part; REVERSED in part.



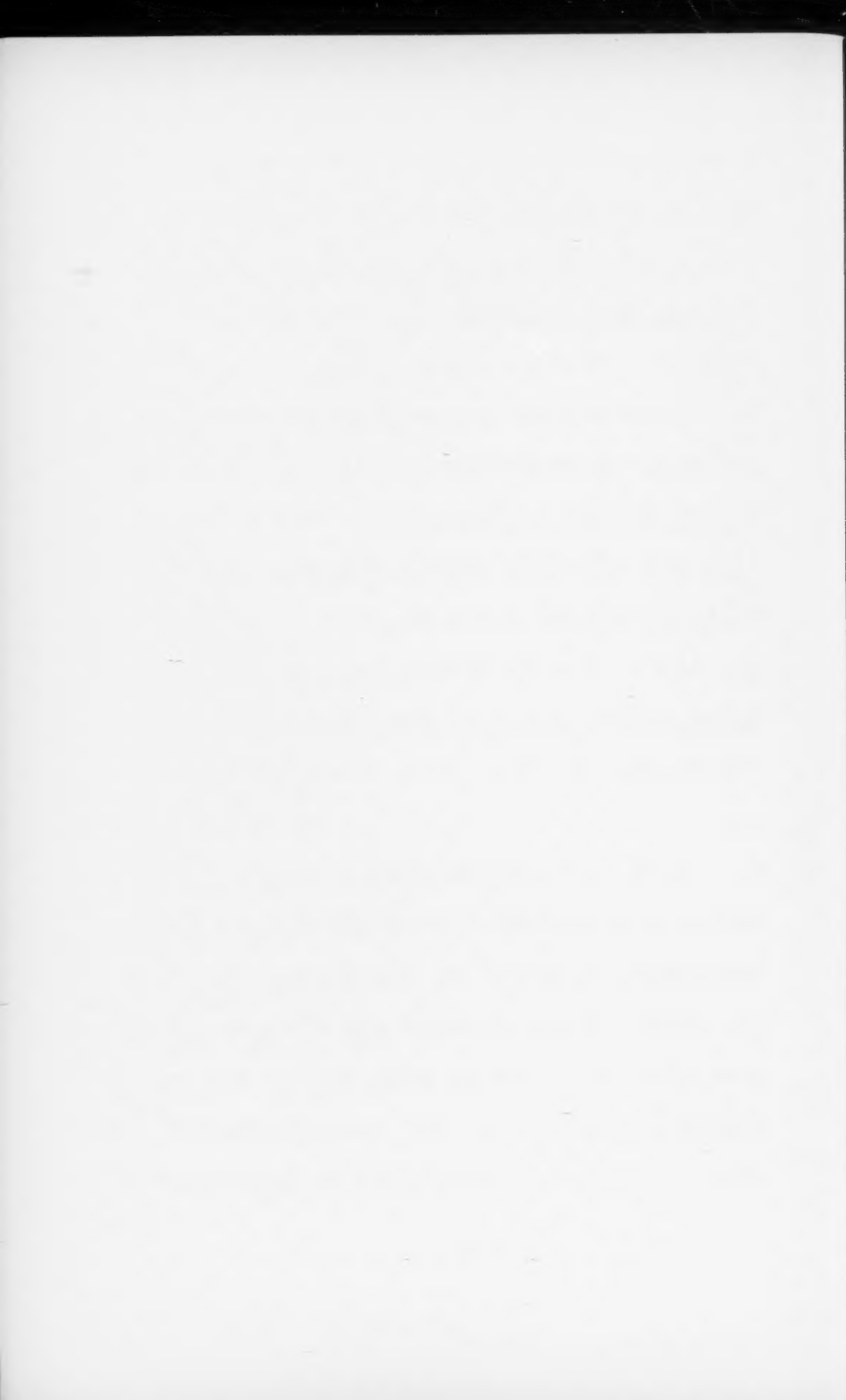
Footnotes

1. We are aware that two circuits have held that illegal acts pertaining to a single criminal episode do not constitute a "pattern of racketeering activity." International Data Bank, Ltd. v. Zepkin, 812 Fed. 2d 149, 154 (4th Cir. 1987); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 & n.7 (8th Cir. 1986), cited with approval in Madden v. Gluck, 815 F.2d 1163 (8th cir. 1987). Three other circuits have held that some acts of racketeering activity do not display the "continuity" that a pattern requires, although they have rejected a bright-line "single episode" exception. Torwest DBC, Inc. v. Dick, 810 F. 2d 925, 928-29 (10th Cir. 1987), cited with approval in Conduct v. Conduct, 815 F. 2d 579, 583-85 (10th Cir. 1987); Roeder v. Alpha Indus. Inc., 814



F.2d 22, 30-31 (1st Cir. 1987); Morgan v. Bank of Waukegan, 804 F. 2d 970, 975-76 (7th Cir. 1986), construed in Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1110-12 (7th Cir. 1987). Two circuits have interpreted "pattern of racketeering activity" broadly and literally; as we do. United States v. Inanniello; 808 F. 2d 184, 192 (2d Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3678 (U.S. Mar. 27, 1987) (No. 86-1553); Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F. 2d 966, 971 (11th Cir. 1986).

2. This explanation also accounts for Moffat's statement that there was no "potential closure" of the factory on June 30, 1983. While closure was then possible, as it is to some degree for any business, Moffat was not then persuaded that closure was inevitable or desirable.



Certainly, Moffat operated Franciscan as though there was no "potential closure." Therefore Moffat's statement does not undermine his credibility or contradict other documents. We reject the dealers' suggestion that Moffat's credibility can be the basis for denying summary judgment. See Excerpt of Record (E.R.) at 843-46.



APPENDIX C



APPENDIX C

18 U.S.C. §§1961-1968 (Racketeer Influenced and Corrupt Organizations Act - RICO)

§1961. Definitions

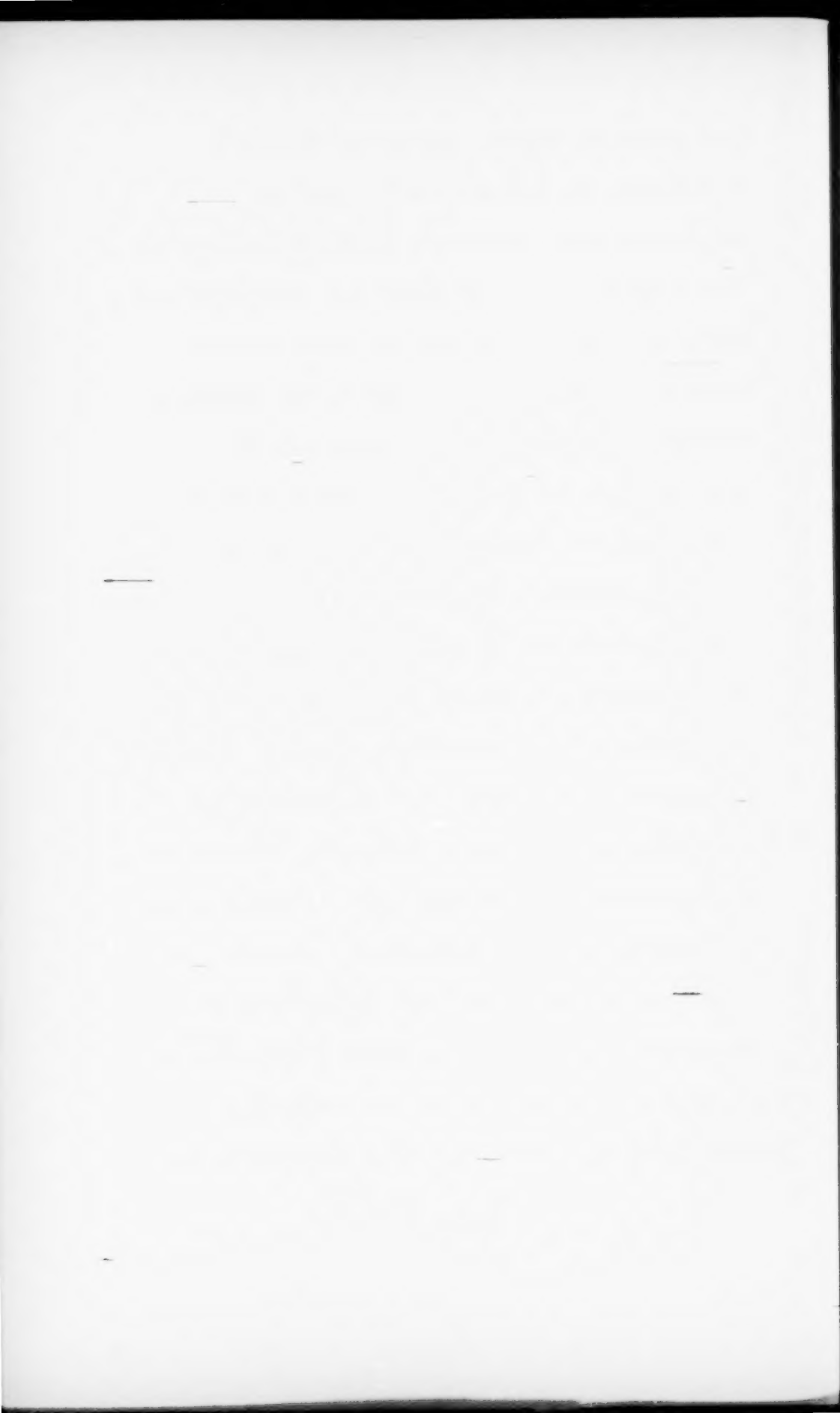
As used in this chapter --

(1) "Racketeering activity" means

(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code; Section 201 (relating to bribery), Section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension



and welfare funds, sections 891-894 (relating to extortionate credit transactions), section 1804 (relating to the transmission of gambling information), section 1341 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to



unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341 and 2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations), or section 501(c) (relating



to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation,



association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the



law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes



any book, paper, document, record,
recording, or other material; and,

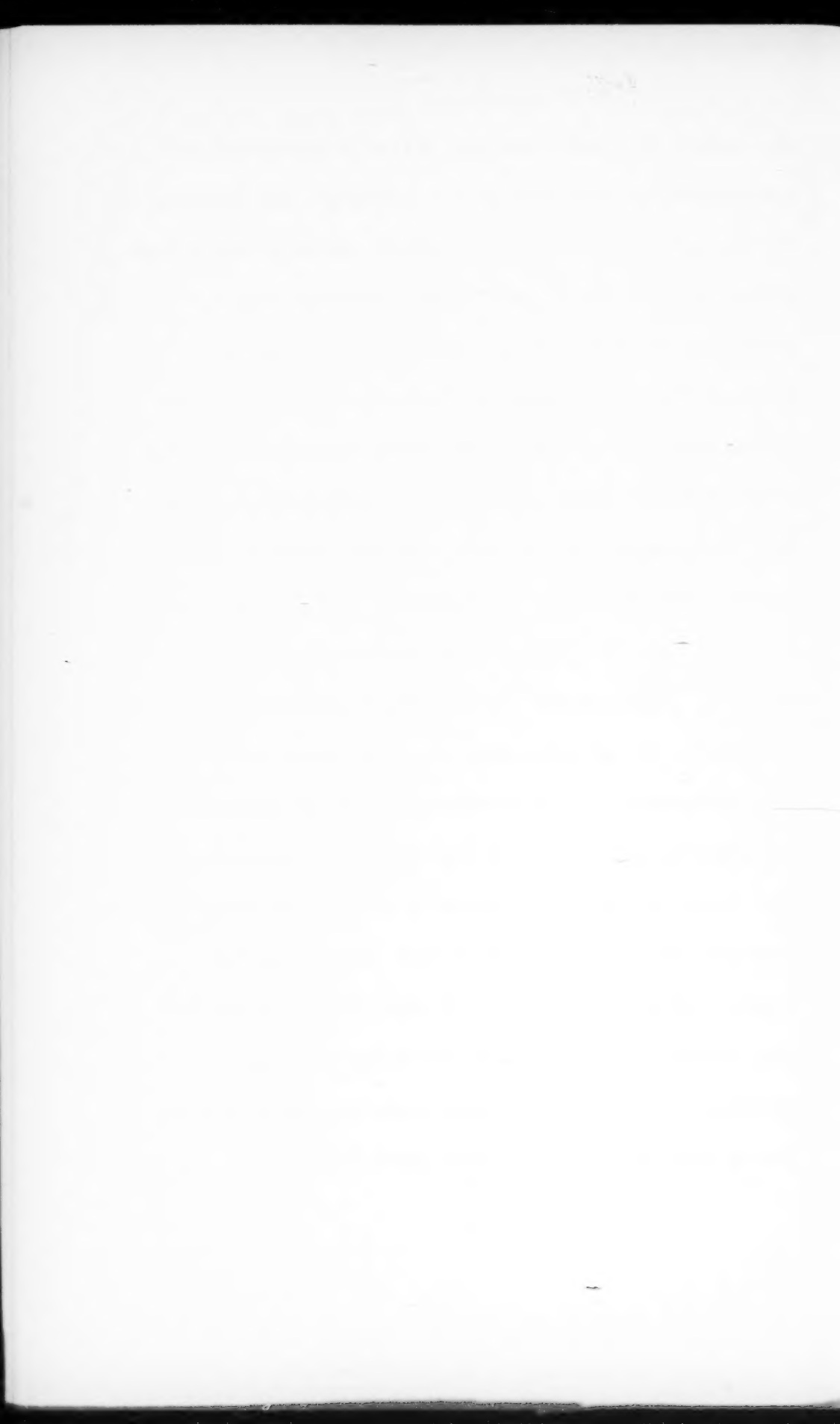
(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived,



directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or



racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprises engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of



such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1963. Criminal Penalties.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law --

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any --

- (A) interest in;
- (B) security of;
- (C) claim against; or



(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from a racketeering activity or unlawful debt collection in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross



profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes --

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (1) that he



is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section --

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such

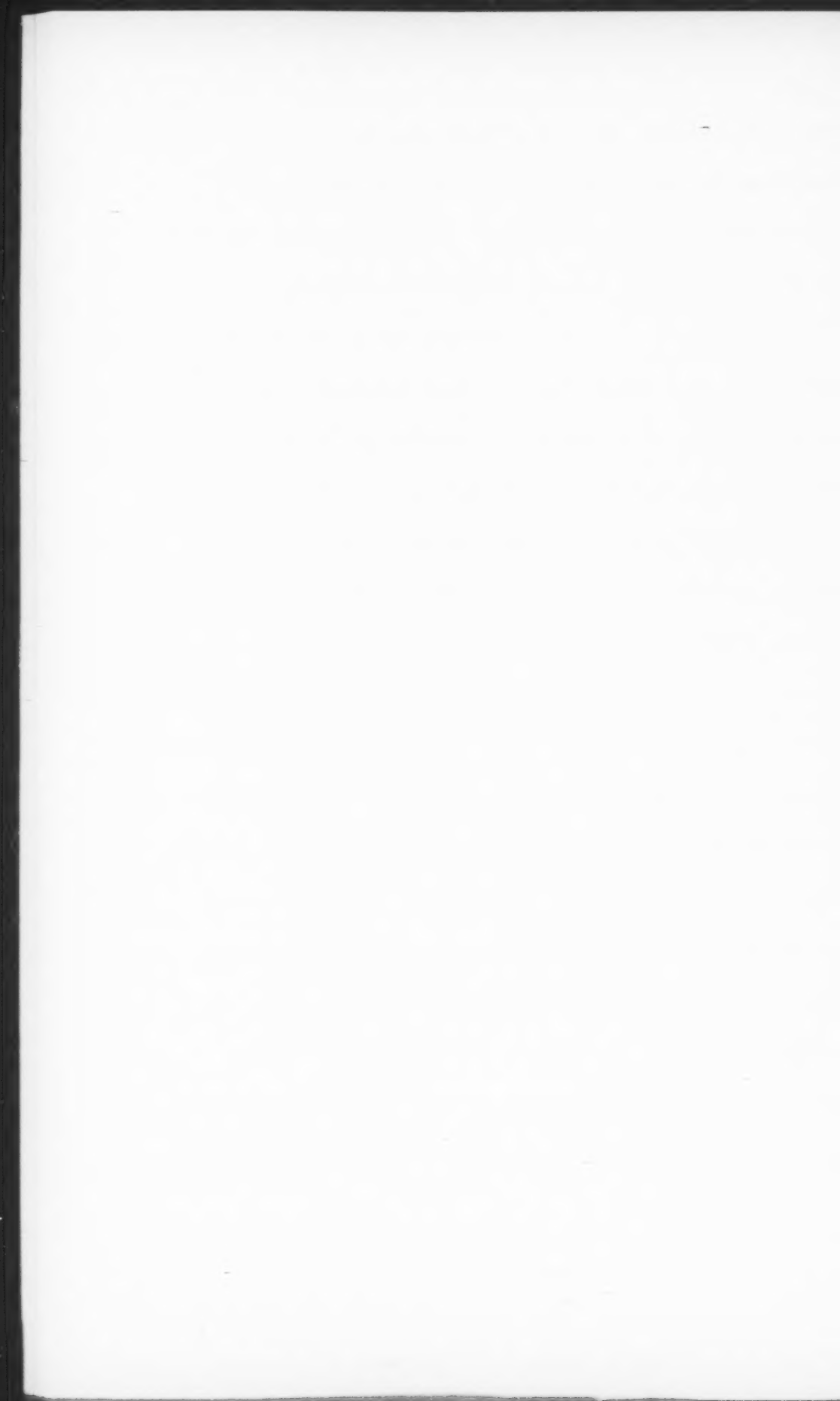


an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that --

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture, and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered;

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information



described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested



concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of



satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value



to, the United States shall expire and shall not revert to the defendants, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and

the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to a property ordered forfeited under this section, the Attorney General is authorized to --

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to

persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition;

(h) The Attorney General may promulgate regulations with respect to --

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property

to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violations of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures



incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (1), no party claiming an interest in property subject to forfeiture under this section may --

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or in equity against the United States concerning the validity of his alleged interest in the property subsequent to the



filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited in the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper,



document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

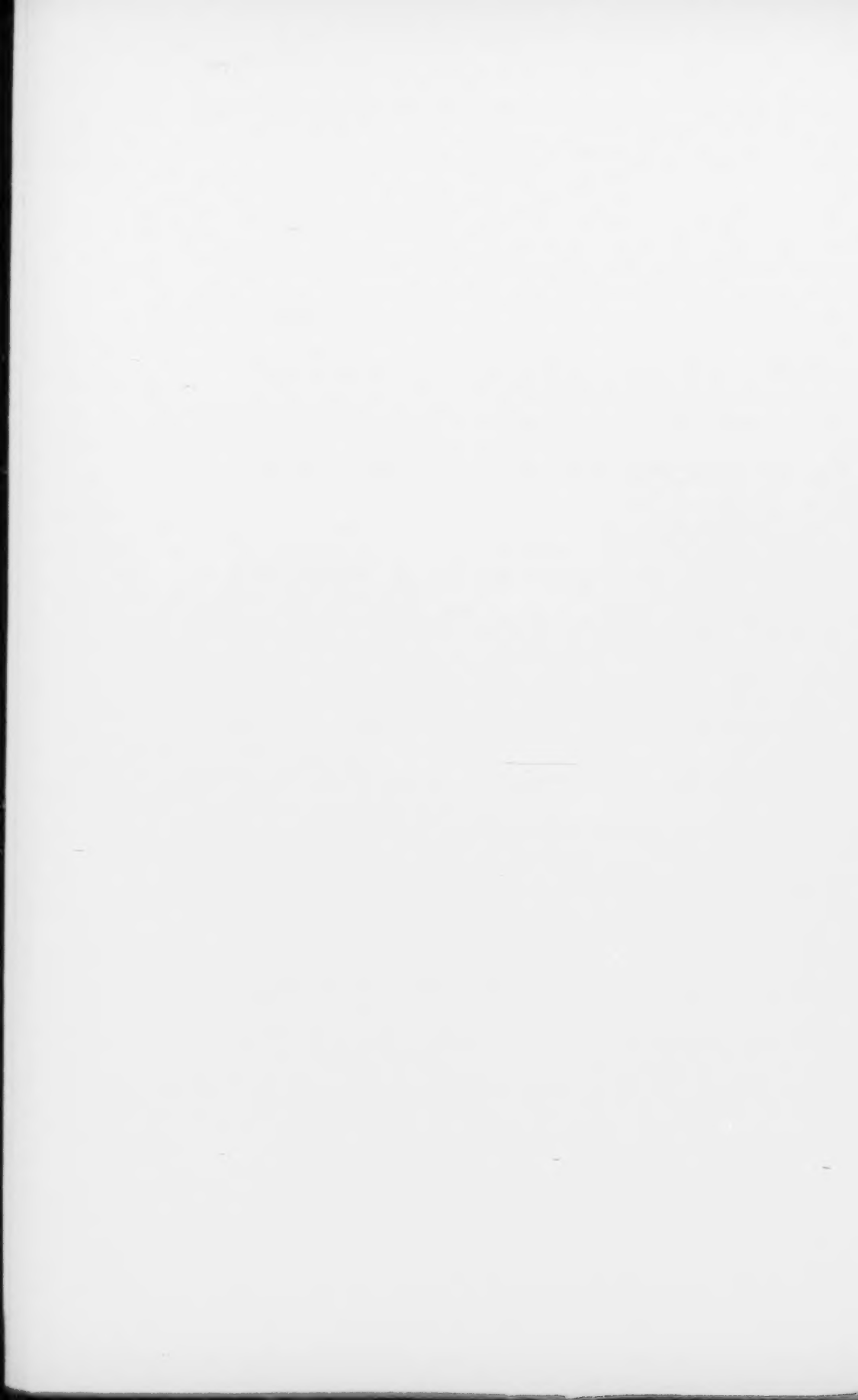
(1) (1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited in

the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

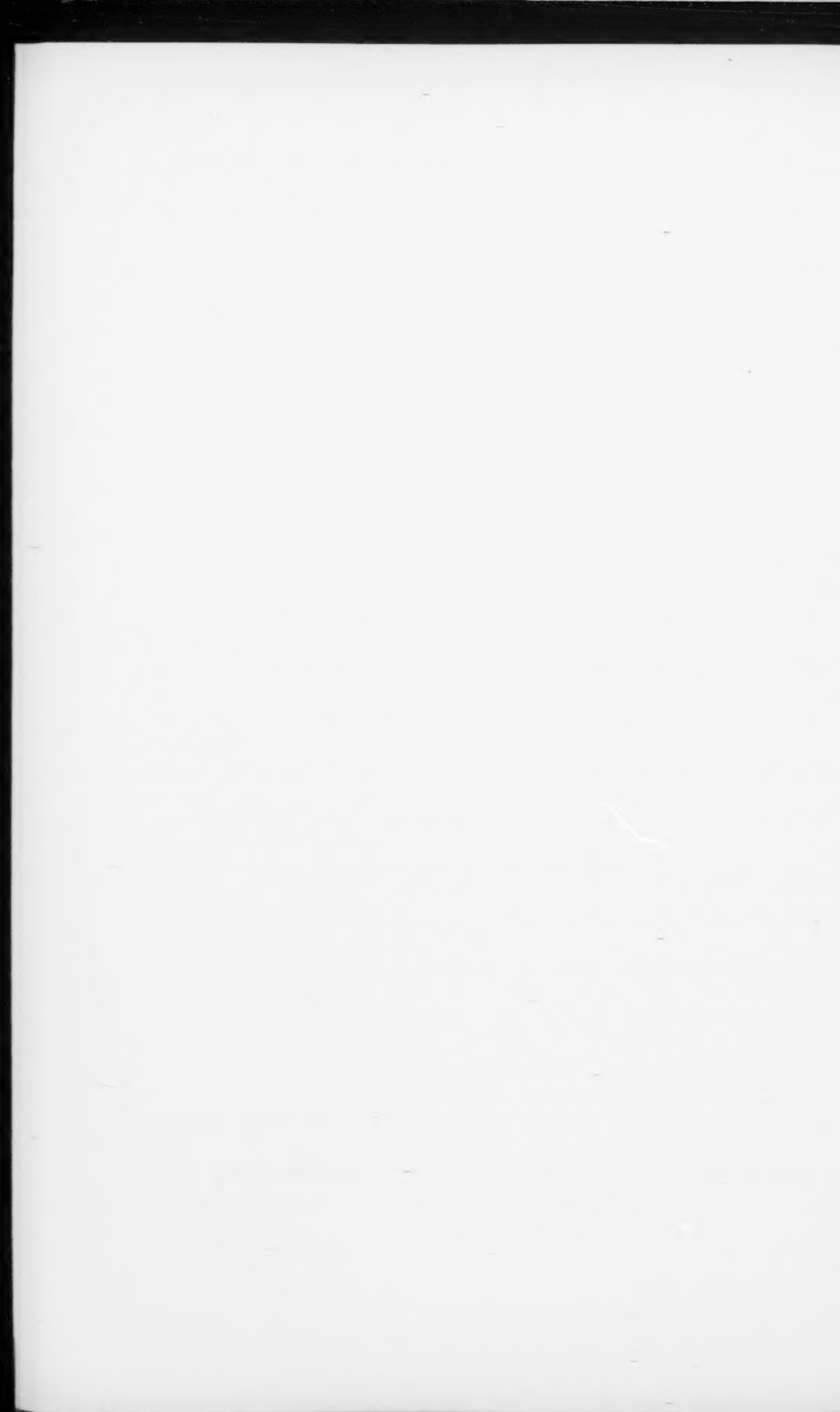
(4) The hearing on the petition shall, to the extent practicable and



consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has



established by a preponderance of the evidence that --

(A) the petitioner has a legal right, title or interest in the property, and such right, title or interest renders the order of forfeiture invalid in whole or in part because the right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its

determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant --

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially



diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any property of the defendant up to the value of any property described in paragraphs (1) through (5).

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise



engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

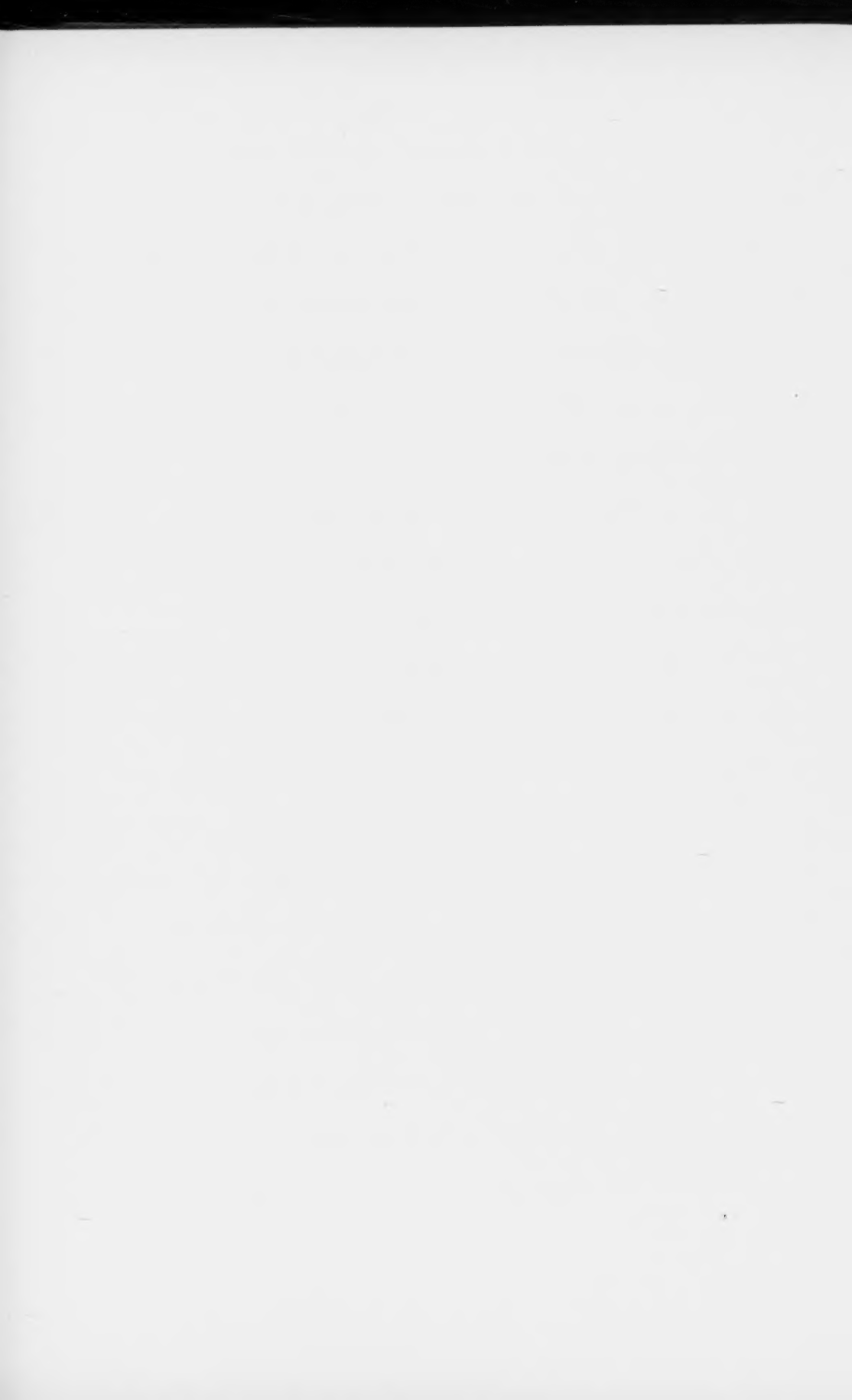


(d) A final judgment or decree rendered in favor of the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial



district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is



found, has an agent, or transacts his affairs. §1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the



discretion of the court after consideration of the rights of affected persons.

§1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in a possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall --

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or



classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall --

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of

any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by --

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the



United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been



duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such



documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General.

While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such

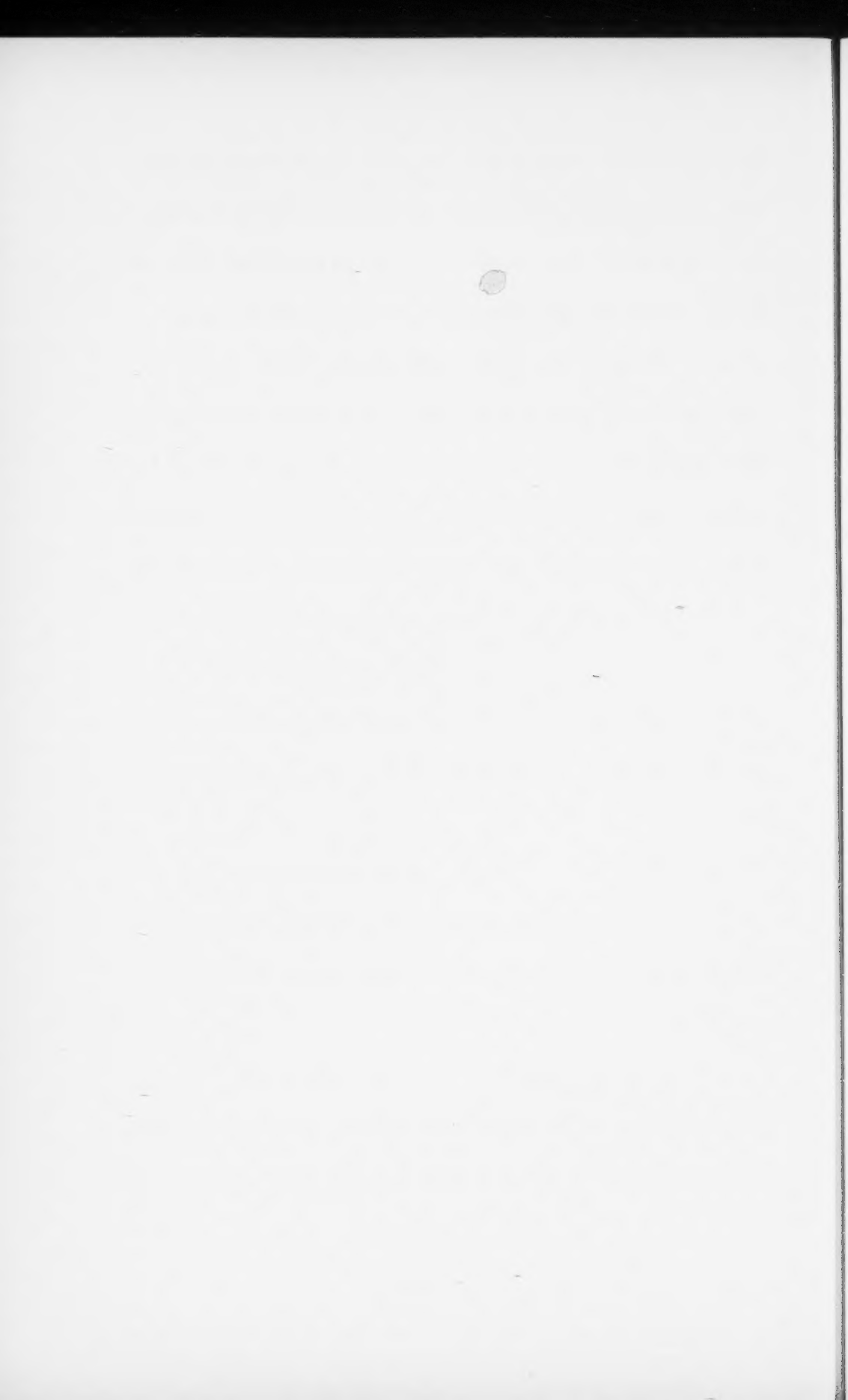
documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding, which attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon completion of --

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) the racketeering investigation for which any documentary material was produced under this chapter, and

(iii) any case or proceeding arising from such investigation, the custodian shall return to the person who



produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly --

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office and with regard thereto, except that he shall not be held responsible for any default or

dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such a person a petition for order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed



upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or



other legal right or privilege of such person.

(i) At any time during which any custodian is in the custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this action.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.



Seventh Amendment to the United States
Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Federal Rule of Civil Procedure 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.



(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of

liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and



the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all such papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set



forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the



other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

87-621

No. _____

Supreme Court, U.S.
FILED

OCT 15 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1987

CALIFORNIA ARCHITECTURAL	)	(Consolidated)
BUILDING PRODUCTS, INC.,	)	86-5822
a California corp., et al,	)	86-5834
	)	86-5974
Petitioners,)	
)	
vs.)	
)	
FRANCISCAN CERAMICS, INC.,)	
et al,)	
)	
Respondents.)	
)	

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENJAMIN GEORGE WILLIAMS, ESQ.
1550 Euclid Street
Santa Monica, CA 90404
(213) 451-0404

Attorney for Petitioners
CALIFORNIA ARCHITECTURAL
BUILDING PRODUCTS, INC., et al.

35 PW

APPENDIX D



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA	)	Nos. 86-5822,
ARCHITECTURAL	)	86-5834, 86-5974
BUILDING)	
PRODUCTS, INC.,	)	D.C. NO.
et al,	)	CV-84-7125-FW
)	
Plaintiff/)	
Appellants/)	
Cross-Appellees,)	
)	
vs.	)	OPINION
)	
FRANCISCAN)	
CERAMICS, INC.,)	
et al,)	
)	
Defendants/)	
Appellees/)	
Cross-)	
Appellants.)	
)	

Argued February 3, 1987-Pasadena, CA
Submitted March 19, 1987

Filed June 4, 1987

Before: Joseph T. Sneed, Jerome Farris
and John T. Noonan, Jr., Circuit Judges

Opinion by Judge Sneed

Appeal from United States District Court
for the Central District of California
Francis C. Whelan, District Judge, Presiding



SUMMARY

RICO

Appeal from grant of summary judgment and imposition of sanctions. Affirmed in part and reversed in part.

This action arises from appellants', dealers in ceramic tile, claim that appellee, a manufacturer of ceramic tile, fraudulently assured them that it would continue in business and supply them with tile at least until the end of March 1984 in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). The district court granted the motion for summary judgment, denied the dealers motion to amend the first amended complaint without prejudice as to future claims not based on RICO, and granted sanctions against the dealers attorneys.

[1] RICO defines pattern of

racketeering activity without mentioning continuity. Because the dealers allege that the manufacturer made multiple fraudulent sales to them as multiple victims, they have alleged acts which constitute a pattern. [2] The manufacturer led the dealers to believe that it intended to stay in business, not to defraud them, but because that was its true intent. [3] The dealers' depositions reveal that they have no factual basis for alleging that the manufacturer had a preconceived plan to close. [4] Furthermore, this court is convinced that no reasonable trier of fact could infer a scheme to defraud from the manufacturer's routine business correspondence. [5] The dealers suggest that the manufacturer ought to have told them it was investigating a contingent plan to close down. [6] However, absent

an independent duty, failure to disclose cannot be the basis of a fraudulent scheme. [7] Since the dealers cannot show that there is a genuine issue of fact regarding the manufacturer's alleged scheme to defraud, denial of leave to amend was well within the district court's discretion. [8] Although Williams ultimately failed to adduce substantial support for the complaint, the suit was not so baseless that sanctions ought to be imposed.

COUNSEL

Benjamin George Williams, Los Angeles, California, for the plaintiffs/appellants/cross-appellees.

John W. Cotton, Los Angeles, California, for the defendants/appellees/cross-appellees.

OPINION

SNEED, Circuit Judge:

Dealers in ceramic tile brought this civil action against a manufacturer under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968. The district court granted summary judgment for the manufacturer on the ground that there was no pattern of racketeering. The court also denied the dealers' motion for leave to amend their First Amended Complaint with prejudice as to any claims based on RICO. Finally, the court granted \$350 in sanctions against the dealers' attorney under Fed. R. Civ. P. 11. We affirm the summary judgment and the denial of leave to amend, but reverse the award of Rule 11 sanctions.



I.

FACTS AND PROCEEDINGS BELOW

Dealers, plaintiffs below and appellants and cross-appellees, are five businesses and six individuals that sold ceramic tile. The appellees and cross-appellants here and defendants below, are a manufacturer of ceramic tile, Franciscan Ceramics, Inc. (Franciscan); its American parent, Josiah Wedgwood & Sons, Inc.; and that company's English parent, Wedgwood plc (Wedgwood).

The dealers' First Amended Complaint alleges that Franciscan fraudulently assured them that it would continue in business and would supply them with tile until at least the end of March 1984. It further alleges that Franciscan decided prior to May 3, 1983 that it would close in September or October 1983. In fact, Wedgwood's board of directors voted on



September 22, 1983 to close Franciscan by the end of October. The dealers charge that Franciscan concealed its plan from them so that they would continue to buy tile. This enabled Franciscan to reduce inventory losses that it otherwise would have suffered had it given notice of its intentions prior to May 3, 1983.

Franciscan made the alleged misrepresentations through the United States mail or through interstate telephone calls. Therefore, the misrepresentations might be the basis of a RICO claim. 18 U.S.C. §1961(1)(B). The dealers claim as damages the costs they incurred in stocking and promoting Franciscan tile on the assumption that Franciscan would continue in business, as well as the profits they lost on both the tile purchased and delivered and the tile ordered but not delivered by Franciscan.

Under RICO, damages are trebled. 18
U.S.C. §1964(c).

Shortly before the discovery cutoff date, the dealers moved for permission to file a Second Amended Complaint. The proposed complaint reflected a more narrow focus than did the first. It alleged as an alternative ground for recovery that Franciscan represented that it had a plan to continue in business through March 1984, when it in fact had no such plan. Franciscan subsequently moved for summary judgment on the First Amended Complaint. Franciscan also moved for sanctions under Fed. R. Civ. P. 11. Franciscan alleged that the dealers' attorney had signed the First Amended Complaint and had persisted in prosecuting the lawsuit when a reasonable inquiry would have disclosed that the First Amended Complaint was not well grounded in fact.

At a hearing held March 4, 1986, the district court granted the motion for summary judgment, denied the motion to amend the First Amended Complaint without prejudice as to future claims not based on RICO, and granted \$350 in sanctions under Fed. R. Civ. P. 11. On April 2, 1986, the dealers filed a notice of appeal from this order. On April 7, 1986, Franciscan filed a notice of cross-appeal from the award of sanctions, insisting that the sanctions were inadequate. On April 30, 1986, the district court entered a judgment conforming to its earlier order. On May 22, 1986, the dealers filed a notice of appeal from this judgment. All notices were timely under Fed. R. App. P. 4(a). This court has jurisdiction under 28 U.S.C. §1291. The two appeals and the cross-appeal are consolidated in this action.

II.

PATTERN OF RACKETEERING

A. Standard of Review for Summary Judgment.

As we regularly recite, this court reviews de novo a grant of summary judgment. Gabrielson v. Montgomery Ward & Co., 785 F.2d 762, 764 (9th Cir. 1986). Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if the pleadings and supporting materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In three recent cases, the Supreme Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First, the Court has made clear that if the non-moving party will bear the burden of

proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. See Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552-53 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 (1986) (emphasis added). Finally, if the factual content makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Matsushita

Elec. Indus. Co. v. Zenith Radio Corp.,
106 S. Ct. 1348, 1356 (1986). No longer
can it be argued that any disagreement
about a material issue of fact precludes
the use of summary judgment.

B. Summary Judgment was Appropriate.

The district court based its grant of
summary judgment on the ground that the
dealers had not shown a "pattern" of
racketeering activity under RICO.

Although we cannot agree with this
conclusion, we do hold that the dealers
failed to show that there is a genuine
issue of fact regarding the facts of fraud
on which the RICO charge is based.

Therefore summary judgment was appropriate
and we affirm the district court.

1. RICO's "Pattern" Requirement.

Turning to the "pattern" requirement,
our starting point is to recognize that a
"pattern of racketeering activity" consists

of at least two acts of racketeering activity. 18 U.S.C. §1961(5). The theory of the dealers, set forth in their First Amended Complaint, is that Franciscan committed at least twenty-four separate acts of mail and wire fraud, which are acts of racketeering activity under 18 U.S.C. §1961(1)(B), and thus constitute a "pattern".

Franciscan replies by expanding the focus of inquiry. In its view the alleged acts of mail and wire fraud do not constitute a "pattern" of racketeering activity because they pertain to a single alleged criminal episode, the closing of Franciscan. A "pattern," Franciscan points out, requires "continuity plus relationship." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, _____, 105 S. Ct. 3275, 3285 n. 14 (1985) (quoting S. Rep. No. 617, 91st Cong. 1st Sess. 158 (1969)



(emphasis added)). Continuity is lacking, Franciscan insists, when acts pertain to a single criminal episode. Under these circumstances there is no ongoing illegal activity.

[1] This approach is not without its appeal. However, the plain words of RICO preclude it. RICO defines "pattern of racketeering activity" without mentioning continuity. See 18 U.S.C. §1961(5).

There is no suggestion that the underlying illegal acts must be part of different criminal episodes. The dictum in Sedima is suggestive, but without additional explication by the Supreme Court we decline to follow its lead. Nor does our recent decision in Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393 (9th Cir. 1986), require us to do so. There we held that plaintiffs failed to state a RICO claim by alleging acts of



mail and wire fraud relating to the diversion of a single shipment of products. Id. at 1399. That was a single fraud perpetrated on a single victim. By contrast, here the dealers allege that Franciscan made multiple fraudulent sales to them as multiple victims. Therefore the dealers have alleged two or more acts of racketeering activity, and this, we hold, constitutes a "pattern." (Footnote 1)

2. The alleged intent to defraud.

The elements of the alleged mail and wire fraud consist of, first, a scheme or artifice devised with specific intent to defraud and, second, use of the United States mails or interstate telephone wires in furtherance thereof. Schreiber, 806 F.2d at 1399-400; see United States v. Bohonus, 628 F.2d 1167, 1171 & n.7 (9th Cir.), cert. denied, 447 U.S. 928 (1980).



In the context of Franciscan's motion for summary judgment, the issue is whether there exists a genuine issue of fact with respect to whether Franciscan had an intent to defraud. The dealers allege that Franciscan has actually admitted this intent. We disagree.

[2] The record, on the basis of which Franciscan's motion must be judged, reveals that Franciscan never misrepresented its intentions to the dealers. Until the day it closed, Franciscan operated as a going concern. Although Franciscan's management investigated closing as a contingency plan, it did not conduct the business as though closing were likely. Franciscan led the dealers to believe that it intended to stay in business, not to



defraud them, but because that was its true intent. Therefore there was no fraud. (Footnote 2) Franciscan's massive, unforeseen operating losses, which upset its plans and forced it to close, cannot retroactively make fraudulent an intent that was honest during the relevant period.

As Wedgwood and its subsidiaries closed their books in March 1983, management realized that Franciscan would show losses substantially exceeding projections. To correct the problem, Wedgwood appointed James Moffat to be the new chief executive office of Franciscan. Moffat was "to try to establish whether there was a future for the operation, and if there was not, then to tidy up the position before closing down and disposing of the site as real estate, although it was felt that this ultimate step would be second best." Extracts of Minutes of a



Meeting of Directors April 27, 1983,
Except of Record (E.R.) at 294. All of
the material collected by the dealers is
consistent with the fact that, between May
and September 1983, Moffat tried to
restore Franciscan's profitability while
investigating opportunities for disposing
of the real estate, should it prove
necessary to close down. Although Moffat
personally was convinced by August 19 that
Wedgwood ought to close Franciscan, the
board did not make its decision until
after Wedgwood's senior operating
executive made his annual visit to
Franciscan in September 1983. Franciscan
continued production through October to
fill outstanding orders.

From May to September 1983,
Franciscan invested substantially in its
tile business. Franciscan continued in
full production and increased its own

inventory. It developed new designs and colors of tile, even some that would not be available until October 1983 or later. It hired a technical consulting firm to visit its factory and recommend improvements. And it explored possibilities for future joint marketing arrangements with other tile manufacturers.

Had Franciscan planned to close, it is unlikely that it would have undertaken these expensive projects. It is also unlikely that Franciscan would go to such lengths merely to encourage the dealers to buy more tile. No economic incentive to act in that manner exists. Therefore to avoid the stigma of implausibility, the evidentiary burden of the dealers is heavy. "[I]f the claim is one that simply makes no economic sense -- [the parties opposing summary judgment] must come forward with more persuasive evidence to

support their claim than would otherwise be necessary." Matsushita, 106 S. Ct. at 1356. We conclude that the dealers have failed to carry this burden.

[3] Our conclusion is not shaken by those portions of the record on which the dealers particularly rely. First, there is no direct evidence -- no "smoking gun." The dealers' depositions reveal that they have no factual basis, apart from discussions with their counsel, for alleging that Franciscan had a preconceived plan to close, far less a plan to dump inventory. E.R. at 506-07 (Larry Ed Bedrosian), 537 (Henry C. Croom), 577-78 (Charles T. Nelson), 584-85 (Vincent Pompo), 590-91 (Richard Thomas Sokol), 601-02 (H.M.M. "Dick" van Gilse). Second, the indirect evidence is weak. The dealers claim that Franciscan made representations that were inconsistent



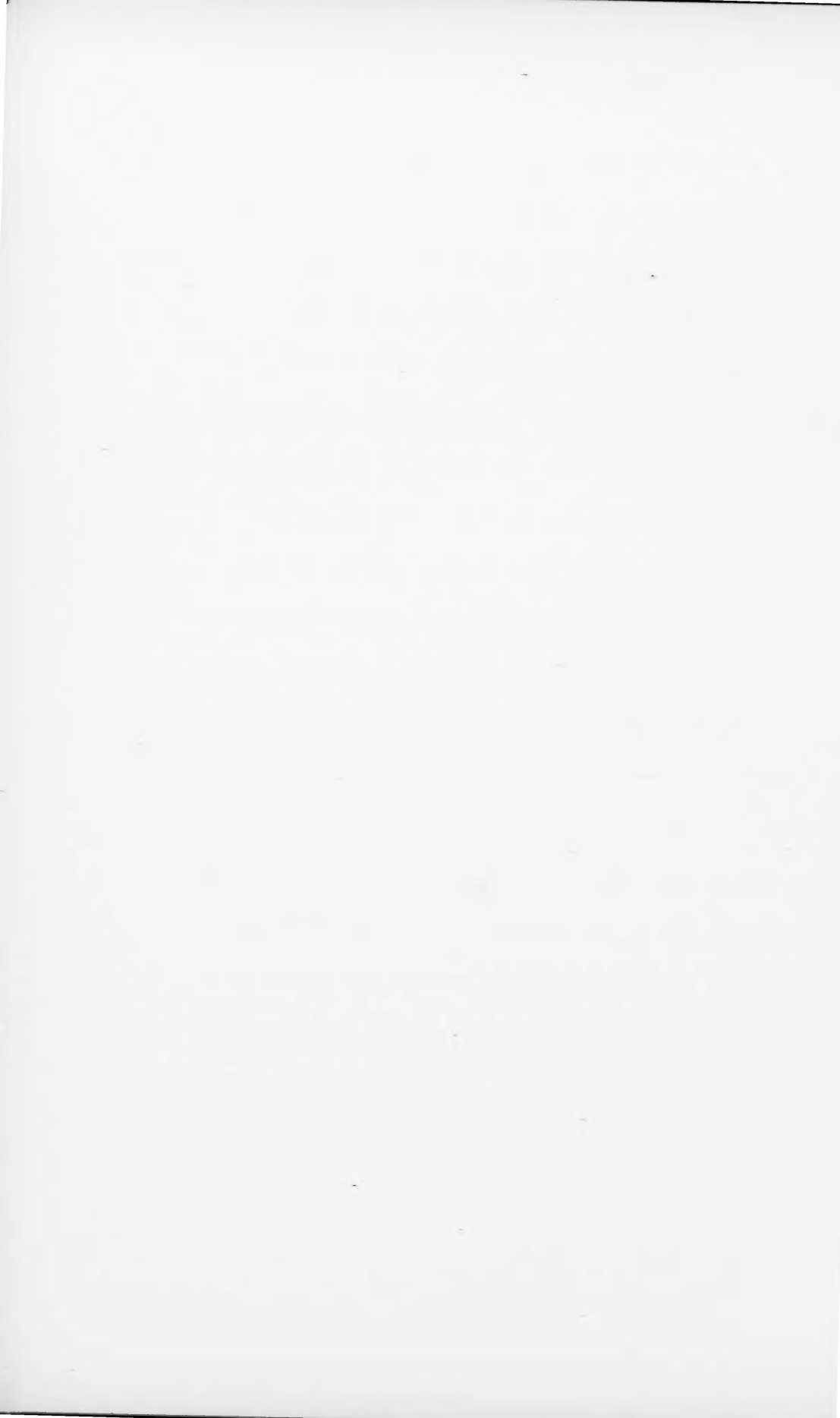
with its decision to close in September 1983. These representations had as their source either routine business correspondence, individual assurances, or failures to disclose. We now examine each of these sources.

a. Routine business correspondence

The dealers purport to find a promise by Franciscan to stay in business in a letter describing its volume discount pricing plan, E.R. at 12-13. (First Amended Complaint ¶22), in a letter announcing a reduced price for a line of tile, E.R. at 13 (First Amended Complaint ¶24), and in its agreements with dealers to supply in the future certain quantities of tile at specified prices, E.R. at 13-20 (First Amended Complaint ¶¶25-34). The dealers confuse these contingent statements of intent with binding commitments. For example, Franciscan said

its volume discount pricing plan would expire March 31, 1984, the date the term of its fiscal year and business plan ends. This is merely a representation that volume discounts probably would not change before then. It is not a promise that Franciscan would remain in business at all costs until then. Nor did Franciscan's promise that, after August 1, it would fill orders for a certain line of tile more quickly and at a lower price constitute a promise to stay in business indefinitely. A promise to sell at a specific price in the future is not a promise to remain in business long enough to sell at that price. To assure that, a prudent businessman would enter into a contract providing for future delivery of specific goods at the agreed price.

[4] Franciscan's routine business correspondence reveals that it made a



sincere and energetic effort to improve sales and become profitable. It never explicitly promised to stay in business until a certain date. We are convinced that no reasonable trier of fact could infer a scheme to defraud from this evidence.

b. Individual assurances

The dealers, in support of their motion opposing summary judgment, point to their declarations describing how officers of Franciscan reassured them when they doubted Franciscan's viability. E.R. at 1027-106. They describe how, early in 1983, officers of Franciscan said that Franciscan was "here to stay" or made similar general assurances. These representations of their intentions were not false. Franciscan had not yet seriously considered closing, and it in fact remained in business six to nine months longer.

The dealers also declare that, in July and August 1983, the executive Vice President of Franciscan, Ira Shore, told them that he had six, twelve, or eighteen months "to turn the business around." E.R. at 1029 (Richard Sokol), 1043 (Vincent Pompo), 1057 (J. Timothy Nelligan), 1078 (Bob Steffler), 1099 (Larry Bedrosian). Shore's deposition confirms that, in early August, he visited several dealers to promote sales and mentioned the six-month time frame. Shore based his statement on a July conversation with Moffat. He told Moffat that he needed six months to improve significantly sales to distributors. Moffat wanted faster results, but accepted Shore's timetable. E.R. at 961-76.

No promise by Moffat was made to keep Franciscan open six months while Shore tried to improve sales. Nor did Shore



understand Moffat to have made such a promise. By mentioning the six-month period to the dealers, Shore sought to emphasize the urgency of Franciscan's appeal to them to buy more. They did not respond. When Shore first made his six-month projection, sales had fallen 36% short of the business plan for June. E.R. at 342. Sales fell 43% short of plan in July, and 37% short of plan in August. E.R. at 346, 463. Franciscan could see the handwriting on the wall. It did not have to wait another four months to recognize the inevitable. Sales were not to improve.

No reasonable trier of fact could infer fraud from Shore's statements. In context, Shore merely fixed a target date before which, to avoid serious trouble, sales would have to improve. Only an incorrigible optimist could understand



that as either a promise to remain open without regard to sales or as a representation of sound economic health.

c. Nondisclosure

[5] The dealers suggest that Franciscan ought to have told them that it was investigating a contingent plan to close down. E.g., E.R. at 1883-86. We disagree.

[6] Absent an independent duty, such as a fiduciary duty or an explicit statutory duty, failure to disclose cannot be the basis of a fraudulent scheme. United States v. Dowling, 739 F.2d 1445, 1449 (9th Cir. 1984), rev'd on other grounds, 473 U.S. 207 (1985). No such duty existed and, hence, no fraud.

III.

DEALERS' MOTION FOR LEAVE TO AMEND

A. Standard of Review

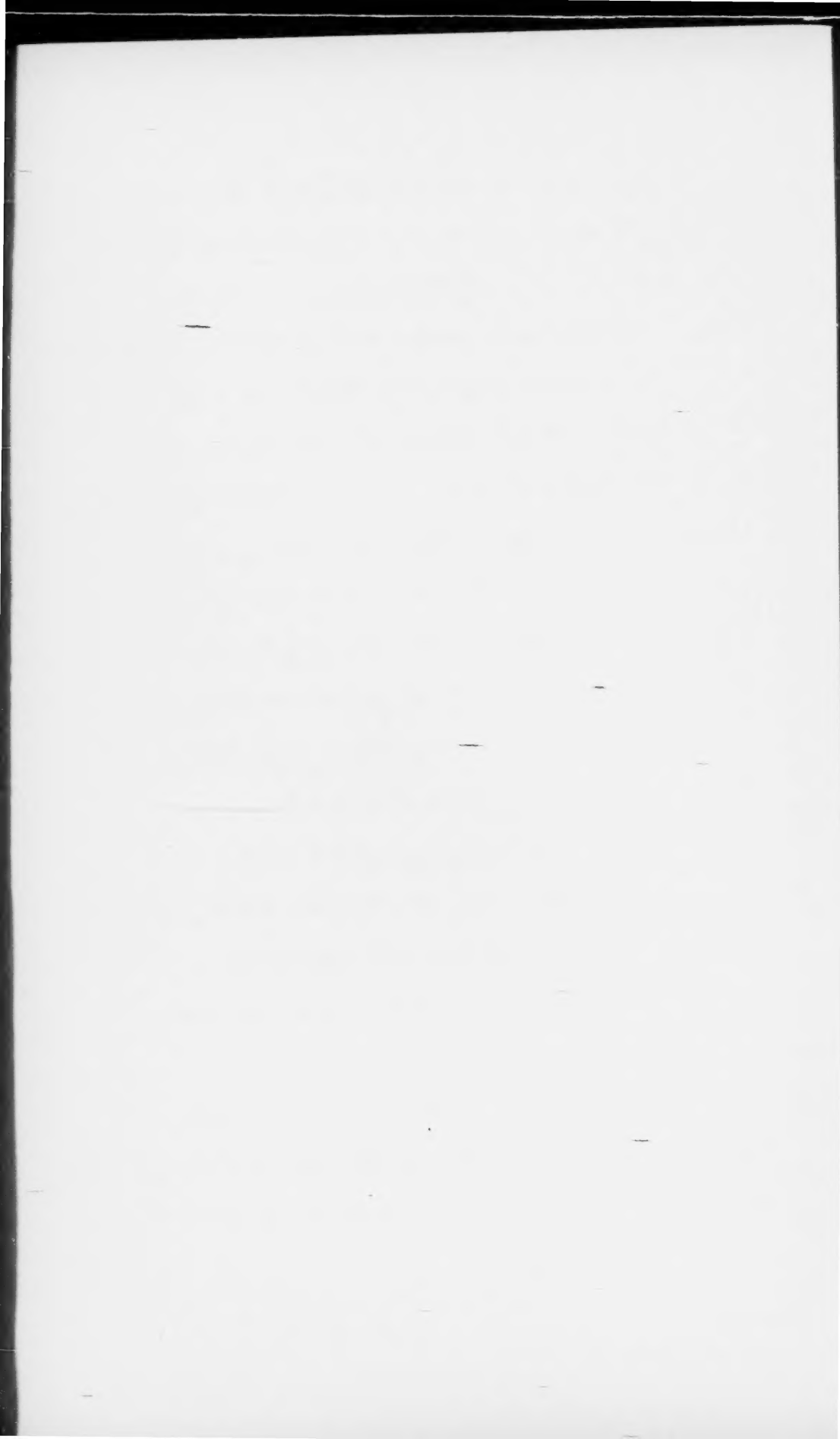
This court reviews for an abuse of



discretion the district court's denial of leave to amend after a responsive pleading has been filed. Gabrielson, 785 F.2d at 765. Unless this court has a definite and firm conviction that the district court committed a clear error of judgment, it will not disturb the district court's decision. Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1331 (9th Cir. 1981). When exercising its discretion, however, the district court must heed Fed. R. Civ. P. 15(a), which says that leave to amend "shall be freely given when justice so requires." Folman v. Davis, 371 U.S. 178, 182 (1962). Valid reasons for denying leave to amend include undue delay, bad faith, prejudice, and futility. Id.

B. Analysis

[7] It is on "futility" that we rest our decision. The proposed Second Amended Complaint adds, as an alternative



theory of recovery, allegations that Franciscan actively considered closing while it represented to the dealers that it intended to remain open. Like the First Amended Complaint, the proposed complaint requires the dealers to prove that Franciscan represented that it would remain open. We can add nothing to our explanation why no reasonable trier of fact could conclude that Franciscan's statements had this force. It follows that the dealers cannot show that there is a genuine issue of fact regarding Franciscan's alleged scheme to defraud. Denial of leave to amend was well within the district court's discretion. Gabrielson, 785 F.2d at 766; see Klamath-Lake Pharmaceutical Ass'n. v. Klamath Medical Sev. Bureau, 701 F.2d 1276, 1293 (9th Cir.), cert. denied, 464 U.S. 822 (1983).



IV.

SANCTIONS UNDER FED. R. CIV. P. 11

A. Standard of Review

This court reviews de novo the district court's legal conclusion that the conduct of the dealers' attorney, Benjamin Williams, violated Fed. R. Civ. P. 11. Lacina v. G-K Trucking, 802 F.2d 1190, 1193 (9th Cir. 1986).

B. Analysis

[8] We reverse award of sanctions against Williams. Franciscan charges that Williams signed the First Amended Complaint and persisted in prosecuting the lawsuit when a reasonable inquiry would have disclosed that the First Amended Complaint was not well grounded in fact. Although Williams ultimately failed to adduce substantial support for the complaint, the suit was not so baseless that sanctions ought to be imposed.



Franciscan's sudden closing was circumstantial evidence, however weak, of a possible earlier undisclosed plan to close. The dealers say they would have bought less in inventory from Franciscan if they had known of its impending closure, so dissimulation might have been in Franciscan's interest. While these facts do not suffice to create a genuine issue for trial, we cannot say that the complaint is so lacking in plausibility as to make Williams' decision to sign and certify it subject to sanctions under Fed. R. Civ. P. 11.

AFFIRMED in part; REVERSED in part.



Footnotes

1. We are aware that two circuits have held that illegal acts pertaining to a single criminal episode do not constitute a "pattern of racketeering activity." International Data Bank, Ltd. v. Zepkin, 812 Fed. 2d 149, 154 (4th Cir. 1987); Superior Oil Co. v. Fulmer, 785 F.2d 252, 257 & n.7 (8th Cir. 1986), cited with approval in Madden v. Gluck, 815 F.2d 1163 (8th cir. 1987). Three other circuits have held that some acts of racketeering activity do not display the "continuity" that a pattern requires, although they have rejected a bright-line "single episode" exception. Torwest DBC, Inc. v. Dick, 810 F. 2d 925, 928-29 (10th Cir. 1987), cited with approval in Conduct v. Conduct, 815 F. 2d 579, 583-85 (10th Cir. 1987); Roeder v. Alpha Indus. Inc., 814



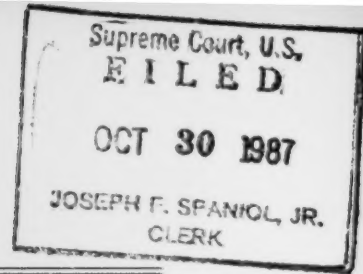
F.2d 22, 30-31 (1st Cir. 1987); Morgan v. Bank of Waukegan, 804 F. 2d 970, 975-76 (7th Cir. 1986), construed in Marks v. Pannell Kerr Forster, 811 F.2d 1108, 1110-12 (7th Cir. 1987). Two circuits have interpreted "pattern of racketeering activity" broadly and literally; as we do. United States v. Inanniello; 808 F. 2d 184, 192 (2d Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3678 (U.S. Mar. 27, 1987) (No. 86-1553); Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co., 782 F. 2d 966, 971 (11th Cir. 1986).

2. This explanation also accounts for Moffat's statement that there was no "potential closure" of the factory on June 30, 1983. While closure was then possible, as it is to some degree for any business, Moffat was not then persuaded that closure was inevitable or desirable.



Certainly, Moffat operated Franciscan as though there was no "potential closure." Therefore Moffat's statement does not undermine his credibility or contradict other documents. We reject the dealers' suggestion that Moffat's credibility can be the basis for denying summary judgment. See Excerpt of Record (E.R.) at 843-46.

3
No. 87-621



In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL BUILDING
PRODUCTS, INC., et al.,
Petitioners,

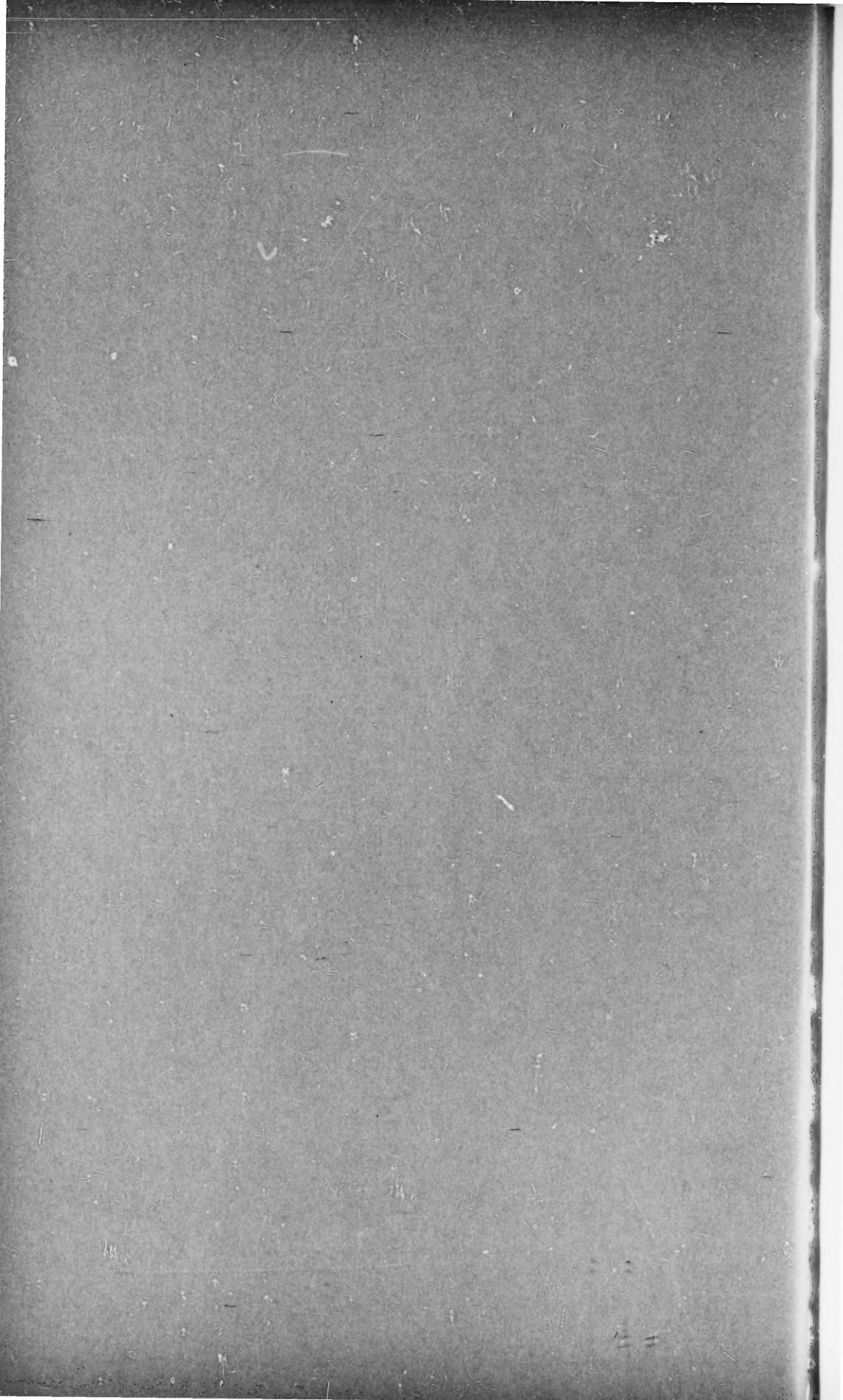
VS.

FRANCISCAN CERAMICS, INC., et al.,
Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

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October 29, 1987



QUESTIONS PRESENTED

1. Did the Ninth Circuit properly apply Fed. R. Civ. P. 56 and this Court's precedent in *Anderson v. Liberty Lobby*, 106 S. Ct. 2505 (1986), *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986) when it affirmed the District Court's grant of summary judgment in favor of Franciscan Ceramics, Inc.?

2. Did the Ninth Circuit decision in *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987) conflict sufficiently with the Eighth Circuit decision in *United Indus. Syndicates, Inc. v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982), to invoke this Court's certiorari jurisdiction?

3. Did the Ninth Circuit substantially depart from the accepted and usual course of judicial proceedings in affirming the District Court's denial of leave to amend on the ground of futility?

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 28.1, respondents Franciscan Ceramics, Inc., Josiah Wedgwood & Sons, and Wedgwood plc identify its parent companies, subsidiaries, and affiliates as follows:

Parent Company: Waterford Glass Group plc

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Rules

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No. 87-621

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL BUILDING
PRODUCTS, INC., et al.,
Petitioners,

vs.

FRANCISCAN CERAMICS, INC., et al.,
Respondents.

**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

STATEMENT OF THE CASE

This action concerns the conduct of Respondents Franciscan Ceramics, Inc. (Franciscan) and its parent companies Josiah Wedgwood & Sons, Inc. (Josiah) and Wedgwood plc (Wedgwood) (hereinafter collectively referred to as Franciscan) in closing Franciscan's failing ceramic tile production plant in October of 1983. The closure of the Franciscan factory spawned a series of breach of contract, fraud and related actions in California state court between Franciscan and a few non-exclusive tile dealers who had purchased Franciscan ceramic tile for resale to the public and construction trade (the tile dealers). These commercial disputes centered on Franciscan's inability to deliver ordered or advertised ceramic tile due to the closure of the factory and the tile dealers'

failure to pay for tile which had been ordered and received prior to closure.

After conducting substantial discovery in the state court actions, the tile dealers brought this action in federal court on September 20, 1984, alleging violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq. ("RICO"). The RICO complaint, which was amended on October 29, 1984, charged Franciscan with a secret scheme devised on or before May 6, 1983 to close Franciscan's tile plant in September or October of 1983. (E.R. 3, 6-8) The alleged RICO plot contained three main elements: (1) "determining to form a plan for closure" on or about March 31, 1983; (2) a decision "[s]ometime prior to May 6, 1983 . . . to close the Franciscan Tile Plant in September or October of 1983," and, pursuant to this decision, (3) Franciscan's misrepresentations to the tile dealers "that [it] would continue in production, for the purpose of selling off Franciscan's inventory" which would "suffer a significant diminution in value" on closure and thereby "wrongfully shift the diminution in value" to the tile dealers. (E.R. 6-9)

On December 16, 1985, more than one year after the complaint was filed and approximately one month before the scheduled pre-trial conference, the tile dealers moved for leave to amend the First Amended Complaint. The proposed second amended complaint alleged alternatively that Franciscan had schemed to unload inventory by misrepresenting to the tile dealers it "had a plan to stay in business producing tile until at least March of 1984," when in fact it was "actively considering" closure and "knew it would not" continue in production until March 1984. (E.R. 119-122)

Franciscan immediately filed a motion for summary judgment on the ground that no reasonable trier of fact

could conclude that Franciscan had schemed to defraud the tile dealers. Simply put, Franciscan had no intent to defraud because it was genuinely engaged in an effort to keep the company in operation throughout the spring and summer of 1983. Respondents established lack of fraudulent intent on the basis of hundreds of contemporaneous business records, including Wedgwood and Franciscan board minutes and internal correspondence, Franciscan accounting and production records, and a 1983-84 business year plan adopted and implemented by Franciscan management. These unchallenged business records demonstrated that, despite aggressive and expensive efforts made by management to improve sales of ceramic tile, Franciscan suffered over a half million dollars in net operating losses during the first half of the 1983-84 business year and significantly increased its warehouse inventory of ceramic tile. Franciscan was forced to close its doors in October 1983 because of these massive, unforeseen losses. (E.R. 198-209, 228-244, 278-288, 289-299, 302, 305-348, 378-407, 459-460, 472-473, 510, 512, 514-515, 548, 559-560, 571-572)

Respondents further moved for summary judgment on the alternative ground that the evidence did not support a finding that respondents had engaged in a "pattern of racketeering" under RICO.¹ Finally, respondents opposed the tile dealers' motion for leave to amend on grounds of futility, delay, prejudice and bad faith. Respondents demonstrated that the proposed amended complaint was futile because they had presented uncontroverted evidence of Franciscan's adherence to the 1983-84 business year plan until the day the Wedgwood board voted to close. Thus, all the evidence indicated that,

¹This alternative ground for summary judgment is the subject of a cross-petition for a writ of certiorari to be filed by respondents concurrently with this opposition.

despite respondents' fallback considerations of closure, they were actively pursuing a course of action calculated to assure Franciscan's future.

The district court granted summary judgment and denied leave to amend on the apparent ground that the tile dealers could not establish a pattern of racketeering under RICO because the alleged scheme to close Franciscan constituted only a "single criminal episode."

The Ninth Circuit, reviewing the entire record *de novo*, affirmed the district court's grant of summary judgment holding that no reasonable trier of fact could infer a scheme to defraud the petitioners:

The record, on the basis of which Franciscan's motion must be judged, reveals that Franciscan never misrepresented its intentions to the dealers. Until the day it closed, Franciscan operated as a going concern. Although Franciscan's management investigated closing as a contingency plan, it did not conduct the business as though closing were likely. Franciscan led the dealers to believe that it intended to stay in business, not to defraud them, but because that was its true intent. Therefore there was no fraud. Franciscan's massive, unforeseen operating losses, which upset its plans and forced it to close, cannot retroactively make fraudulent an intent that was honest during the relevant period.

California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1470 (9th Cir. 1987)

The Ninth Circuit based its holding on the evidence of respondents' numerous and energetic efforts during the spring and summer of 1983 to turn the company around and the lack of any direct proof of a preconceived plan to close. It found that no reasonable inference of fraudulent intent could be drawn from management's statements and

routine business correspondence regarding the future operations of the company. The court concluded that "only an incorrigible optimist could understand [the statements] as either a promise to remain open without regard to sales or as a representation of sound economic health."-*Id.* at 1471.

The Ninth Circuit also affirmed the denial of leave to amend on the ground of futility in light of its finding that Franciscan's statements could not reasonably be construed as a promise to remain open until March of 1984 without regard to sales: "We can add nothing to our explanation why no reasonable trier of fact could conclude that Franciscan's statements had this force." *Id.* at 1472.

REASONS FOR DENYING THE PETITION

I.

The Ninth Circuit Properly Applied Fed. R. Civ. P. 56 In Affirming Summary Judgment In Favor of Respondents.

Petitioners assert that the Ninth Circuit placed an improper burden on them by applying the summary judgment standard enunciated by this Court in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986). (Petition, at p. 13) Petitioners apparently contend that the *Matsushita* standard was intended only to apply to implausible antitrust conspiracies.² Petition-

²Even if the tile dealers are correct in asserting that the *Matsushita* holding was designed to address implausible antitrust conspiracies, sufficient parallels between the antitrust laws and RICO exist to support application of the *Matsushita* standard here. As recently recognized by this Court in *Agency Holding Corporation v. Malley-Duff Assoc.*, 107 S. Ct. 2759 (1987), RICO, like the antitrust laws, was designed to remedy economic injury to business and property. More-

ers have offered no support for their contention except to acknowledge that antitrust conspiracies can be economically implausible because the purported conspiratorial practice may serve a legitimate business purpose as well.

Respondents submit that the Ninth Circuit correctly construed and applied *Matsushita* as well as this Court's other recent pronouncements on the standard for summary judgment in *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986) and *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986). These summary judgment decisions did not confer on the lower court the power to weigh competing inferences or to determine issues of credibility, as petitioners seem to suggest. Such factual determinations rest exclusively within the province of the jury. Rather, the Court's decisions clarified the evidentiary burden of the plaintiff (as non-moving party) to establish that genuine factual issues may reasonably be resolved in its favor. They further "increased the utility of summary judgment" by confirming the lower court's power to reject implausible or unreasonable inferences proffered by the plaintiff. *Franciscan*, 818 F.2d at 1468. As stated by the Ninth Circuit, "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Id.* Only reasonable inferences can withstand such a test.

over, motive and intent are key elements to establishing claims under these statutes. Finally, in determining the inferences which can fairly be drawn from the evidence, courts should consider in both types of cases the chilling impact which implausible inferences will have on the ability to conduct business.

A predetermination of "reasonableness" by the trial court is firmly rooted in Rule 56. In *Liberty Lobby*, this Court defined the trial judge's responsibility in considering summary judgment requests as follows:

The inquiry performed is the threshold inquiry of determining whether there is a need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Liberty Lobby, 106 S. Ct. at 2511.

This Court further stated that:

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict

Id. at 2512.

In determining what constitutes a reasonable inference, a "court may look to other evidence in the record which tends to make that inference more or less plausible." *Standard Oil Co. v. Department of Energy*, 596 F.2d 1029, 1065 (Temp. Emer. Ct. App. 1978). If "the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable [people] could not arrive at [but one] verdict," *Boeing v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969), the court should grant summary judgment.

In *American Tel. & Tel. Co. v. Delta Communications Corp.*, 590 F.2d 100 (5th Cir. 1979), *cert. denied, sub nom. Delta Communications Corp. v. National Broadcasting Co.*,

444 U.S. 926, a panel of the Fifth Circuit Court of Appeals, in a petition for rehearing en banc, was accused of having weighed inferences from established facts instead of indulging every reasonable inference in favor of the party opposing summary judgment. The court, in clarifying the summary judgment standard, stated:

[I]t is hornbook law that the court must indulge every *reasonable* inference from those facts in favor of the party opposing the motion. Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do.

Id. at 101-02. (Emphasis in original).³

Critical to the summary judgment analysis, as recognized in this Court's decisions in *Celotex*, *Liberty Lobby*, and *Matsushita*, is the trial judge's role in making a threshold predetermination of the proffered evidence based on judicial experience and the realities of everyday life. If an inference to be culled from a fact is so far removed from the ordinary, the rational or the reasonable, the trial judge is within his or her discretion to give the inference little weight. The Ninth Circuit in *Franciscan* did precisely that in affirming summary judgment in favor of respondents.

³In continuing, the court opined in anecdote the permissible range of inferences allowed: "If a frog be found in the party punch bowl, the presence of a mischievous guest — but not the occurrence of spontaneous generation — may reasonably be inferred." *Id.* at 102.

Like *Matsushita*, the Ninth Circuit was faced in *Franciscan* with a factually implausible scheme.⁴ The uncontroverted evidence showed that Franciscan was inherently incapable of implementing a scheme to unload its tile inventory onto the tile dealers prior to closure. Because a substantial portion of the tile dealers' orders for ceramic tile had to be specially manufactured, Franciscan was required to stay in full production to fill orders. Franciscan could not, as the tile dealers well knew, have surreptitiously shut down its kilns while selling off its warehoused tile to unsuspecting distributors.

Having demonstrated the inherent implausibility of the alleged scheme, respondents went further to negate by substantial circumstantial evidence any reasonable inference of a scheme or "plan" to close the factory. Respondents established through their unchallenged business records that Franciscan not only maintained full production of ceramic tile throughout the spring and summer of 1983, but that it implemented a 1983-84 business year plan that called for substantial capital outlays for, among other things, research and development of new tile, outside technical assistance on production problems, and a mass marketing drive scheduled for the spring of 1984.

In affirming summary judgment, the Ninth Circuit did not, as petitioners contend, weigh "the inference of fraud

⁴Petitioners' assertion that, by denying Rule 11 sanctions, the Ninth Circuit effectively conceded the economical plausibility of the alleged scheme is completely unfounded. (Petition, at p. 20). In reviewing respondents' request for Rule 11 sanctions, the Ninth Circuit only looked at whether counsel had a colorable claim at the time of filing the complaint. The fact that a colorable claim was presented at the commencement of suit is irrelevant at the summary judgment stage when the plaintiff has had a full opportunity to conduct discovery and must come forward with significant, probative evidence of the alleged scheme. See *Liberty Lobby*, 106 S. Ct. at 2511.

against inferences . . . that Franciscan was operating on a going concern basis." (Petition, at p. 21). Rather, it heeded the advice of the Fifth Circuit in *American Tel. & Tel. Co.*, *Id.* at 101-02, by measuring the overwhelming and *uncontroverted* evidence of Franciscan's operation as a going concern against an abstract standard of reasonableness. It properly assessed the economic realities in finding that no reasonable trier of fact could infer from the evidence that respondents had fraudulently misrepresented Franciscan's business plans. In short, "Franciscan led the dealers to believe it intended to stay in business, not to defraud them, but because that was its true intent." *Franciscan*, 818 F.2d at 1470.

Given the overwhelming evidence of Franciscan's good faith, the Ninth Circuit was correct in holding that "the evidentiary burden of the dealers is heavy." *Id.* Because the barometer of abstract reasonableness plunged toward the improbable, more probative evidence than would otherwise have been necessary was required to return it to a threshold of reasonableness. *Matsushita*, 106 S. Ct. at 1356. The tile dealers' mere conjectures and fantasies of a scheme to close Franciscan in order to dump inventory failed to discharge that burden. Summary judgment was therefore warranted.

II.

The Ninth Circuit Decision In *Franciscan* Is Not In Conflict With The Eighth Circuit Decision In *Western Auto*.

Petitioners contend as a peripheral basis for jurisdiction that the Ninth Circuit's decision in *Franciscan* conflicts with the Eighth Circuit's holding in *United Indus. Syndicate v. Western Auto Supply Co.*, 686 F.2d 1312 (8th Cir. 1982). In *Western Auto*, the Eighth Circuit reversed the district court's grant of summary judgment in favor of

the defendant in a breach of contract and common law fraud action involving the termination of a supplier-retailer relationship. The court found that fact issues existed as to whether the retailer had a duty to disclose its decision to terminate the business relationship or affirmatively defrauded the supplier into believing that the relationship would continue.

Western Auto does not conflict with the Ninth Circuit's decision below because the Eighth Circuit's findings hinged on critical evidentiary issues which were not present in *Franciscan*. Moreover, *Western Auto* was decided prior to this Court's rulings in *Celotex*, *Liberty Lobby*, and *Matsushita* and therefore did not benefit from the guidance provided by these decisions in assessing the non-moving party's evidentiary burden under Fed. R. Civ. P. 56.

In *Western Auto*, the plaintiff-retailer presented substantial, probative evidence of an oral agreement between the parties which required the defendant-supplier to provide six months advance notice of an intent to terminate the business relationship. This key fact, the court found, supported an inference that the retailer had affirmatively induced the supplier to rely on expectations of a continued business relationship. *Western Auto*, 686 F.2d at 1318.

Without this key evidence of an oral agreement, the court could not have reversed summary judgment on the intentional misrepresentation claim. Indeed, the court conceded that, "apart from any issue as to Western's knowledge of the 1978 oral agreement," the plaintiff had presented only a "colorable claim" of intentional misrepresentation. *Id.* As this Court recently reaffirmed in *Liberty Lobby*, evidence which is "merely colorable" has never been sufficient to withstand summary judgment. *Liberty Lobby*, 106 S. Ct. at 2511.

In stark contrast to *Western Auto*, there was no allegation and no evidence in this action of an agreement to provide the tile dealers with advance notice of termination. Thus, the very linchpin of the plaintiff's case in *Western Auto* — the oral agreement — was not before the Ninth Circuit. Moreover, the courts were faced with distinctly different economic backdrops from which to gauge the parties' conduct. Western terminated its nearly exclusive relationship with its supplier in order to obtain cheaper or better goods from another manufacturer. Franciscan, on the other hand, was forced to terminate its non-exclusive relationships with the tile dealers due to uncontrollable and growing losses. Whereas Western apparently presented no evidence that the alleged fraudulent scheme was economically infeasible or implausible, Franciscan adduced significant evidence, as noted by the Ninth Circuit, that it had no economic incentive to mislead the tile dealers. Clearly, the Eighth and Ninth Circuits have not presented this Court with conflicting rulings on the inferences which reasonably may be drawn from the evidence when that evidence — as demonstrated above — was dissimilar in several material respects.⁵

⁵It is equally clear that the circuits do not conflict on what factual showing is necessary to establish a duty to disclose business decisions in the context of a supplier-retailer relationship. *Western Auto* did not interpret or apply federal law as it was exclusively concerned with Western's duty of disclosure under Missouri law. In any event, the tile dealers have not challenged the Ninth Circuit's opinion on this ground as they state that they "do not allege that Franciscan had a duty to disclose its business plans to its Dealers . . ." (Petition at p. 25).

III.

The Ninth Circuit Did Not Depart From The Accepted And Usual Course Of Judicial Proceedings In Affirming The District Court's Denial Of Leave To Amend.

As a third possible basis for jurisdiction, petitioners assert that the Ninth Circuit substantially departed from the "accepted and usual course of judicial proceedings" by affirming the district court's denial of leave to amend. Petitioners contend that the Ninth Circuit misconstrued the proposed amended complaint and failed, as a result, to consider the tile dealers' claim that Franciscan represented it had "a plan to remain open — i.e., that closure was not under consideration at all." (Petition, at pp. 24-25) (emphasis in original). By "plan," petitioners apparently mean that Franciscan promised to remain in business, regardless of sales or other contingencies.

The Ninth Circuit clearly considered — and rejected — the tile dealers' contention that Franciscan promised to remain in business at any cost through March of 1984. In this regard, the lower court was unequivocal: "[Franciscan] never explicitly promised to stay in business until a certain date. We are convinced that no reasonable trier of fact could infer a scheme to defraud from this evidence." *Franciscan*, 818 F.2d at 1471. "Only an incorrigible optimist could understand [Franciscan's statements] as either a promise to remain open without regard to sales or as a representation of sound economic health." *Id.*

Based on these findings, the Ninth Circuit was correct in holding that the trial court did not commit a clear error of judgment in denying leave to amend on the ground of futility. See *Thism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1331 (9th Cir. 1981). (Appellate court may not disturb the district court's decision in denying leave to

amend unless it has a definite and firm conviction that the district court committed a clear error of judgment.) In sum, the tile dealers have presented no valid basis for invoking this Court's jurisdiction.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 29, 1987

BEST AVAILABLE COPY

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On October 29, 1987, I served the within BRIEF IN OPPOSITION in re: "California Architectural Building Products, Inc. vs. Franciscan" in the United States Supreme Court, October Term 1987, No. 87-621;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

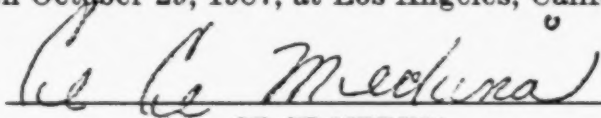
Benjamin George Williams, Esq.
1550 Euclid Street
Santa Monica, CA 90404

All Parties required to be served have been served.



I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on October 29, 1987, at Los Angeles, California


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(4)
No. 87-621

Supreme Court, U.S.

FILED

NOV 27 1987

JOSEPH F. SPANIOL, JR.
CLERK

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term, 1987

CALIFORNIA ARCHITECTURAL
BUILDING PRODUCTS, INC.,
a California corp., et al.,

Petitioners, [Consolidated]
86-5822
86-5834
vs. 86-5974

FRANCISCAN CERAMICS, INC.,
et al.,

Respondents.

**REPLY TO THE OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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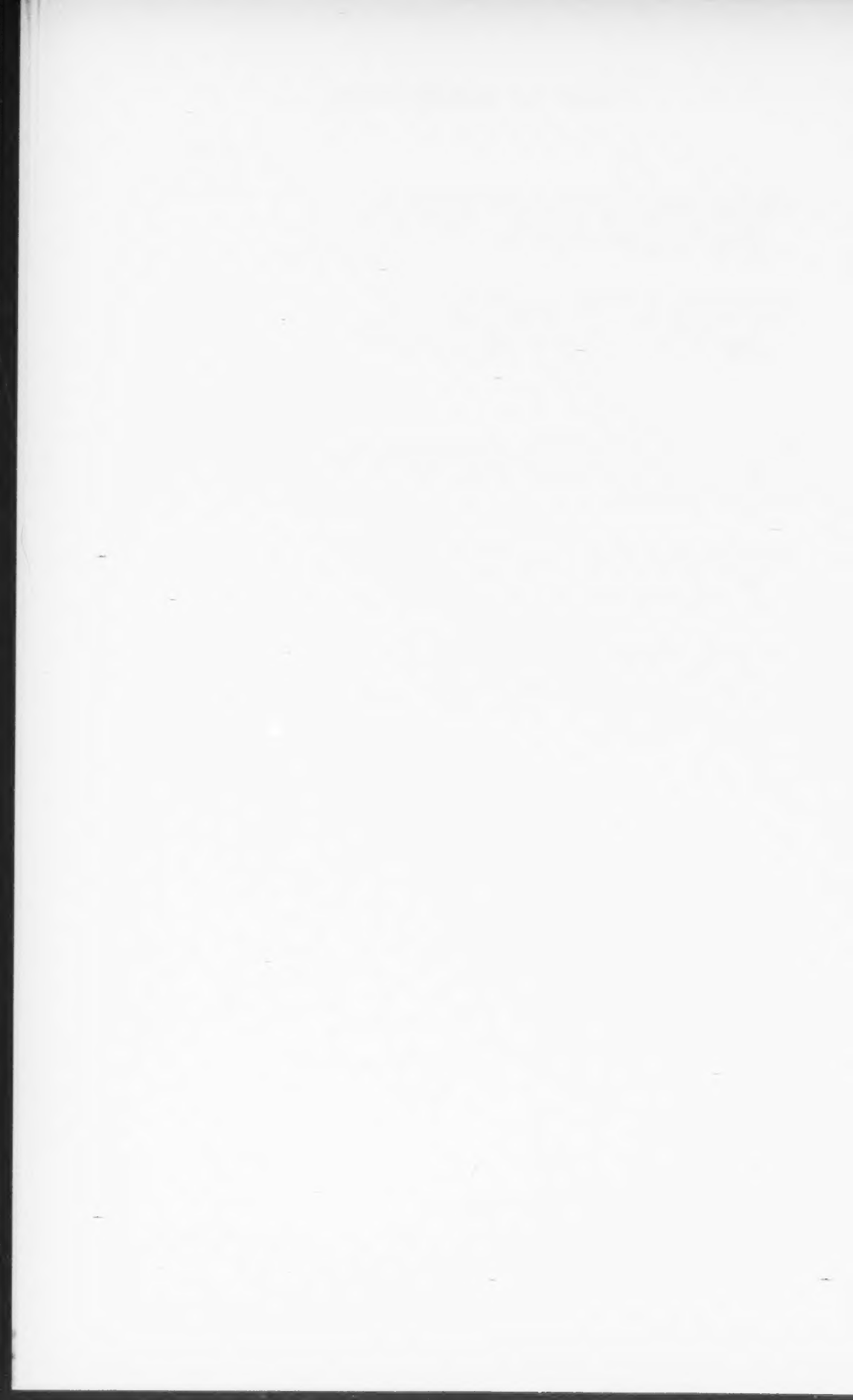
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NO. 87-621

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OCTOBER TERM, 1987

CALIFORNIA ARCHITECTURAL)	(Consolidated)
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I. THE MATSUSHITA SUMMARY
JUDGMENT STANDARD SHOULD
NOT BE APPLIED OUTSIDE
THE ANTITRUST CONTEXT.

The Tile Dealers invite this Court to consider that Franciscan's Opposition Brief barely mentions the Matsushita "economically plausible" standard and whether it should be applied in a RICO case. That Brief dwells at length on the reasons why Franciscan had to shut the plant. Franciscan's Opposition Brief, *passim*.

The Tile Dealers' Complaint is not based on the closure of the Franciscan plant; it is based on the wire and mail fraud Franciscan perpetrated on the Tile Dealers about how it was planning to go on doing business at least through the end of



March, 1984 when it had no such intent.

It made perfect economic sense for Franciscan to go on producing tile, and it made perfect economic sense for Franciscan to lie, via use of the United States mails and interstate telephone, to the Tile Dealers about its plans to stay in business when it had no such plans or its plans were to the contrary. The Tile Dealers do not contend that Franciscan's tile production and factory shut down are actionable under RICO. The Tile Dealers contend that Franciscan's defrauding them, via United States mail and interstate telephone system, is actionable under RICO.

But the Matsushita "economically implausible" test should never have been applied by the Ninth Circuit to a RICO case, as this Court impliedly held in

Sedima, 473 U.S. 479, 105 S.Ct. 3275 at 3286-3287. This Court's decision in Agency Holding Corporation v. Malley-Duff Assoc., 107 S.Ct. 2759 (1987), Franciscan Opposition Brief at 5, on the RICO statute of limitations only is certainly not dispositive and arguably not even relevant in light of Sedima.

This Court, in Matsushita Elec. Indus. Co. v. Zenith Radio Corporation, 106 S.Ct. 1348 (1986), lowered the threshold for summary judgment for the defendant only in the very special context of antitrust actions. Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486 (1962) had already established that "summary procedure should be used sparingly in complex antitrust litigation," 368 U.S. at 473, 82 S.Ct. at 491, so that Matsushita served merely to limit Poller.

Antitrust law lends itself to allegations of schemes which are inherently implausible, because the schemes, as alleged by the plaintiff, work to the defendant's short term disadvantage. Matsushita, for example, involved predatory pricing, which, as alleged by the plaintiff, would involve the defendant's willfully losing money in the short term by pricing its product below cost, in the hope of gaining market domination in the future.

The Tile Dealers do not allege that Franciscan ever willfully lost money. They allege that Franciscan's tile dumping scheme was profitable from its inception (please see Part II of this Reply).

Schemes which allegedly result in the defendants losing money are rare outside antitrust law. Here Franciscan's



scheme was economically sound, albeit fraudulent. Franciscan proceeded in two directions at once:

1. It went on making tile and reassuring all the Tile Dealers it would, or had a plan to, stay in business through the end of March, 1984, while,

2. It went on planning to shut down the factory if it saw fit, an alternative strategy of which it did not inform the Tile Dealers.

If the Tile Dealers had known that Franciscan was considering shutting down the factory they would have handled their businesses differently and would have avoided a large portion of their losses.

The Matsushita summary judgment standard is simply not appropriate in litigation outside the antitrust laws.



II. FRANCISCAN'S FRAUD
AS ALLEGED BY THE
TILE DEALERS, IS NOT
INHERENTLY IMPLAUSIBLE.

Franciscan's Opposition Brief reflects a misunderstanding of the economics of minimizing losses while shutting down a plant. Minimizing losses does not require that Franciscan "surreptitiously shut down its kilns" while selling off its tile. (Brief in Opposition, p. 9.) Once a decision is made to shut down a plant, fixed costs (i.e., costs of plant and equipment) no longer have to be recovered before a profit is made, because the plant and equipment will never be replaced.

Franciscan could to sell its tile after it decided to close, or started to



plan to close, only by representing to its dealers that it had a plan to remain open or did not intend to close.

Franciscan's scheme was not inherently implausible, but rational and self-serving. Franciscan profited from selling tile, while its dealers were left with worthless inventory. The fraud, as alleged, and as revealed through discovery clearly passes the economic implausibility Matsushita test, which should not have been applied in the first place.

III. FRANCISCAN'S FAILURE TO
DISTINGUISH WESTERN AUTO
SUPPLY CO. FROM THE
OPERATIVE FACTS OF THE
FRANCISCAN FRAUD UNDERSCORES
THE CONFLICT BETWEEN THE
EIGHTH AND NINTH CIRCUITS.



In United Indust. Syndicate v.

Western Auto Supply Co., 686 F.2d 1312

(8th Cir. 1982), it was held that a distributor's conduct calculated to create a false expectation on the part of its supplier that their long standing business relationship would continue, was sufficient to make out a case of fraud.

Franciscan's Opposition states that Western Auto is distinguishable because in that case there was evidence of an agreement to provide six months notice of termination of the business relationship. The Western Auto court found that the fraud action was sufficient to withstand a summary judgment motion "quite apart from any issue as to Western's knowledge of the 1978 oral agreement" providing for six months notice of termination. 686 F.2d at 1318. An oral contract was not necessary



for a finding of fraud.

The Eighth Circuit in Western Auto did not state that the fraud claim therein was "only" a colorable claim, as implied by the defendants in their opposition. (See Opposition Brief at p. 11). The Court simply said that the fraud claim was "colorable" in the sense of being legitimate and cognizable by the Court, without any attempt to diminish the value of that claim. See 686 F.2d at 1318.

IV. THE TILE DEALERS' SECOND
AMENDED COMPLAINT SHOULD
HAVE BEEN FILED.

Franciscan's Opposition Brief incorrectly characterizes the Tile Dealers' explanation of the proposed Amended Complaint. (Franciscan Opposition Brief at 13.) That Franciscan represented


it had a plan to stay open does not mean, as stated by the defendants, that Franciscan promised to remain in business "regardless of sales or other contingencies." Opposition Brief p. 13.

Even if Franciscan had no intent to close when its representations were made to the Tile Dealers, its consideration of closing made its representations to the Tile Dealers fraudulent.

The Ninth Circuit's misapprehension of the nature of the Second Amended Complaint, and its affirmance of the District Court's denial of leave to amend, does the Tile Dealers an injustice, which should be reversed by this Court.

Dated: November 25, 1987

Respectfully submitted,


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